Supreme Court, U.S.
FILED

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No.

# In the
# Supreme Court of the United States

MARSHALL K. FLOWERS and ANNA FLOWERS,
*Petitioners*,

v.

UNITED STATES ARMY, 25th Infantry Division; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHLWEILER, Captain,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 was enacted by Congress in order to provide protection against unrestricted access to financial records to fill in void left by the Supreme Court holding in *United States v. Miller*, 425 U.S. 435 that a bank customer has no constitutionally protected privacy interest in bank records. The questions presented in this case are:

1. Whether *Feres v. United States*, 340 U.S. 135 bars petitioners' claim under the Right to Financial Privacy Act.

2. Whether the Ninth Circuit's ruling that *Feres* bars petitioners' RFPA claim conflict with decisions of other courts. Namely, the U.S. Court of Appeals for the Armed Forces, the United States Court of Appeals for the Fourth, Fifth, Tenth, and District of Columbia Circuit.

3. Whether *Feres* shields the United States Army from discovery in petitioners' suit against First Hawaiian Bank and Fort Jackson Federal Credit Union for violation of the Act.

4. Whether the court erred in granting the financial institutions summary judgment and awarding cost to Fort Jackson Federal Credit Union.

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1 (b), the following identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit. The petitioners here and appellants below are Marshall K. Flowers and Anna Flowers. The appellees below and respondents are United States of America, United States Army, 25th Infantry Division (L), Thomas E. White in his official capacity as Secretary of the Army and John Ohlweiler in his official capacity as Captain, United States Army (collectively "federal defendants"), First Hawaiian Bank and Fort Jackson Federal Credit Union, Fort Jackson, South Carolina.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners states that Marshall K. Flowers and Anna Flowers were plaintiffs-appellants below in two cases consolidated below and in the appeals court. Both hold no publicly held company that has a 10% or greater ownership interest.

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Marshall K. Flowers and Anna Flowers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit

## OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision in an unpublished memorandum and is reproduced in the appendix and attached hereto (Pet.App. 2a-7a). The district court final judgments are at Pet.App. 55a-56a and 57a-58a. The opinion of the district court are reported at 289 F. Supp. 2d 1213 (D. Hawaii 2003), and 295 F.Supp. 2d 1130 (D. Hawaii 2003) and attached hereto at Pet. App. 81a-97a and Pet. App.59a-80a respectively.

## RELATED CASE

The opinion of the lower Court in *Flowers v. First Hawaiian Bank* is reported at 85 F. Supp. 2d 993 and the Ninth Circuit's remand is reported at 295 F.3d 966 (9th Cir. 2002).

## JURISDICTION

The judgment of the court of appeals was entered on May 3, 2006. Pet. App. 2a-7a. Petitioners submitted a timely petition for rehearing and rehearing en banc that was denied on September 14, 2006 (Pet. App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Right to Financial Privacy Act, Pub. L. No.96-630 (1978)(codified at 12 U.S.C, §§ 3401-3422) and pertinent portions are reproduced at Pet. App. 98a-113a, Title 32 Code of Federal Regulations (C.F.R) parts 274 and 504 (Obtaining Information from Financial Institutions)) cited in this petition are reprinted in Pet. App. 114a-141a and provisions of the Federal Tort Clams Act 28 U.S.C. §§ 1346(b), 2671-2680 (h).

## STATEMENT

I. Petitioners Marshall K. Flowers ("SGM Flowers or Mr. Flowers") and Anna Flowers (Ms. Flowers) (collectively "the Flowers") sued the U.S. Army, First Hawaiian Bank ("the Bank") and Fort Jackson Federal Credit Union ("the Credit Union") (collectively "financial institutions) for violating their financial privacy under the Right to Financial Privacy Act ("RFPA"), 12 U.S.C.§§ 3401-3422. See also 32 CFR §504. The district court dismissed the Flowers' claims against the federal defendants pursuant to *Feres v. United States*, 340 U.S. 135 (1950) on October 31, 2003. Pet. App. 81a-97a. Thereafter, entered summary judgment and cost for Fort Jackson Federal Credit Union ("Credit Union") against the Flowers holding that 12 U.S.C. § 3413(e)[1] applied. But the court determined the Bank was liable to the Flowers for

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[1] 12U.S.C. § 3413(e), which provides that "[n]othing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules in other courts in connection with litigation to which the Government authority and the customer are parties."

statutory damages of $100 each, one third cost of attorney fees at $13,500.00.82 and cost of $496.30. Pet.App.14a.

**A. Procedural History**

1. The facts as determined by lower court are disputed except that on December 13, 1997 Army and Air Forces Exchange System (AAFES) personnel detained and questioned SGM Flowers for suspected shoplifting. During detainment, SGM Flowers presented to military police an exchange receipt given him by store greeter Ms. Raymondi Kunasaki for exchange of a "Western hard drive." Additionally, Ms. Kunisaki provided Criminal Investigative Division (CID) agents a sworn statement that affirmed the receipt provided to SGM Flowers and her signature. Ms. Kunisaki's and others' statement obtained were concealed and false information provided in an affidavit to a military judge in Washington State that provided CID persons with a search authorization to search the Flowers' living quarters and confiscate their personal property.[2]

2. Through altering of evidence and improper influenced, on or about April 7, 1998 Captain John Ohlweiler (hereinafter "Maj. Ohlweiler")[3] had Capt. Joseph Hall, HHC 25th ID to prefer charges against SGM Flowers that alleged violation of

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[2] The Army alleges it has been investigating the Flowers over a period of time for returning items to the Post Exchange without a receipt and on film depicting SGM Flowers stealing from the Naval Exchange and other exchanges in Hawaii.

[3] Capt. John Ohlweiler was a assigned to the 25th Infantry Division Trial Services Office as a member of the Judge Advocate General Corp. Since then he has been promoted to major and will hereinafter be referred to in the present rank.

Article 121(Larceny). Then Maj. Ohlweiler convened an unauthorized Article 32 hearing[4] on June 25-26, 1998 to intimidate and coerce SGM Flowers into retirement. But prior to the hearing, Maj. Ohlweiler telephoned First Hawaiian Bank and Fort Jackson Federal Credit Union where the Flowers maintained accounts and obtained their agreement to produce the Flowers' financial records. Later, which he provided two unauthorized subpoenas; one to the Bank for an unauthorized Article 32 hearing and the other to the Credit Union for a [non-existent] General Court-Martial dated June 19 and June 24, 1998 respectively. [5] The Flowers were not notified that the Army has sought and obtained their financial record. Nor did the Army provide financial institutions with a certificate of compliance. *See* 12 U.S.C.§§ 3402 (4), 3403(b), 3407 *see also* 32 C.F.R. §§ 504.2(e), 504.2(k)(3) (1998) (Pet. App. 100a-101a, 103a, 124-125a, 132a) and Army Regulation (AR) 190-6, para 2-5 (15 January 1982) (a certificate of compliance with the Right to Privacy Act of 1978(App C) will be provided to the financial institution as a prerequisite to obtaining access to financial records

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[4] An Article 32, in general terms is an investigative proceeding that is required under Article 32, Uniform Code of Military Justice before a General Court Martial is convened.

[5] The subpoena allegedly provided Fort Jackson was not made available by neither the Army or the Credit Union until sometime prior to the release of the Ninth Circuit decision in *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002).

under...judicial subpoenas (para 2-5)).[6] Emphasis added Pet. App. 151a.

3. On June 25, 1998 out side the hearing, Capt. Randy Bagwell reviewed the financial records, female civilians entered the hearing after which Capt. Bagwell followed.[7] The Flowers became aware the Army had illegally obtained their financial records in November 1998. Then SGM Flowers was subject to harassment, intimidation, and forced to accept non-judicial punishment (Article 15).[8]

4. After Maj. General Hill, Commander 25th ID became aware of the process, charges for alleged violations of Article 121 (Larceny) and Article 81 (Conspiracy) were re-preferred on November 9, 1998. Capt. Kimberly Hunta was appointed Article 32 Investigating Officer and the hearing held on March 18-19, 1999. Capt. Hunta determined that charges were unsupported and recommended against court martial. The charges were dismissed on June 28, 1999. Maj.

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[6] AR 190-6, para 2-5, echoes the definition of a judicial subpoena but acknowledges that a subpoena issued pursuant to the Manual for Courts-Martial, para 115, and the Uniform Code of Military Justice, art. 46, would qualify as a judicial subpoena for purposes of the Right to Financial Act. The regulation advises that if a judicial subpoena is issued under the act and AR 190-6, para 2-5, the notice and challenge provision of 12 U.S.C.§§ must be followed. See DA Pam 27-50-131.

[7] Capt. Randy Bagwell was a military lawyer and collegue of Capt. Ohlweiler while both were assigned to the Trial Counsel Office, 25th Infantry Division (L).

[8] Military punishment administered pursuant to 10 U.S.C.§ 815 by a superior officer upon waiver of one's right to a formal court-martial.

Ohlweiler retaliated through using the position of his office to bar SGM Flowers from reenlistment.[9] SGM Flowers, fourteen months short of completing thirty-years involuntarily retired on February 1, 2000.

**B. *Flowers v. First Hawaiian Bank* Proceeding Below and Remand of the Ninth Circuit Court**

1. Initially, the Flowers alleged the bank provided copies of their financial records to the Army absent obtaining a certificate of compliance and sued the bank on May 7, 1999. In March 2000, the district Court dismissed that suit holding that the bank did not violate the RFPA because its conduct was in response to Army's Article 32 subpoena and within the RFPA exemptions for information disclosed in the course of litigation between the government and a private citizen. *See* 12 U.S.C. § 3413(e) *see also Flowers v. First Hawaiian Bank*, 85 F. Supp. 2d 993. The Flowers appealed but pending the court's decision sued the Army and Credit union for violation of the RFPA. *See* RFPA § 3417(a), *see also* 32 CFR § 504.2 (k) (3) and AR 190-6, para 2-12 (15 January 1982) Pet. App. 132a and Pet. App. 159a-160a. The credit union in partial discovery allegedly mailed financial records to the Army absent the required certificate of compliance. 12 U.S.C. § 3403(b).

2. The Ninth Circuit remanded *Flowers I* on July 2, 2002. The court held that the subpoena issued for the Article 32

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[9] Army Regulation ("AR") 601-280, Chapter, 8(b) provides that "[t]he bar to reenlistment is not a punitive action but is design for used as a rehabilitative tool. As justification for its actions, the Army delivered its Army's Annual Report (2002) to Congress that deliberately provided the U.S. Congress incorrect facts that "SGM Flowers' retired in lieu of Court martial." See AR 601-280.

hearing was invalid and grand jury exception under §§ 3413(e) and 3413(i) did not apply, and that the "bank produced the records at it own peril" when it failed to obtain a certificate of compliance. *see* § 3403(b); *Flowers v. First Hawaiian Bank*, 295 F.3d at 970-77(9th Cir. 2002). Thereafter, the Flowers amended the complaint and added the Army as a defendant. Both *Flowers I* (No: 99-00335 SPK) and *Flowers v. Department of the Army, et. al.*(Civil 01-00412 SPK) were consolidated on November 22, 2002.

3. In March 2000 the district court informed Mr. Flowers a special rule existed to speak on his wife while in Australia. The court later recanted and the Flowers hired attorney Charles R. Brown ("Mr. Brown") to represent them on February 6, 2003. At which defendants United States, Secretary of the Army Thomas White and Maj. John Ohlweiler were added to a Second Amended complaint filed on March 27,2003. When the Flowers questioned Mr. Brown's tactics, adding the United States, discovery and payments exceeding $10,000.00 a month, he motioned to withdraw. The court granted motion on August 7, 2003.[10]

**C. The District and Appellate Court Decision in the Instant Appeal**

On September 18 and 24, 2003 the government filed motions to dismiss the Second Amended Consolidated Complaint for lack of subject matter jurisdiction. It argued damages against the Army is barred by *Feres* citing e.g.,

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[10] Petitioners filed a complaint with the Office of Disciplinary Counsel, State of Hawaii and the attorney was suspended in March 2006 for failing to cooperate with the Office of Disciplinary Counsel in their investigation.

*Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997)("The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service.")(quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)(emphasis in original). The Flowers disagreed arguing the district court's jurisdiction under 12 U.S.C. § 3416. Pet. App. 111a. The court rejected that argument concluding that *Feres* requires the Court to dismiss [petitioners' RFPA] complaint against the government. *Id.*

1. The government argued that "[r]uling in favor of the government here does not mean military personnel have no right to financial privacy. The question is whether they should have a right to sue for damages if the violations occurred "incident to service." A finding against Marshall Flowers does not bar a member of the armed services from an action for violations of the RFPA if the disclosures occurred in other circumstances... "even if the RFPA 'protects' Flowers, this does not necessarily mean he should be entitled to damages from the Army." Pet. App. 92a. *See Flowers*, 289 F.Supp.2d. at 1219.

2. On October 31, 2003 the court dismissed the Flowers' claims against the Army and federal defendants. The dismissal's order stated in relevant part that:

> Marshall K. Flowers cannot dispute that his (and his wife's) claims" arise out of or in the course of activity incident to service." *Id.* Assuming the truth of the operative complaint's allegations and considering the undisputed evidence in the record, Marshall K. Flowers was an active duty Sergeant Major in the Army when the financial disclosures took place. That is, he was on active duty when the alleged violations

of the RFPA occurred. The relevant disclosures of bank records occurred in the course of, and because of, a military Article 32 proceeding against him investigating charges of larceny at military exchanges. Marshall Flowers retired or resigned from the Army in lieu of facing a general martial. He filed this civil action after leaving the Army. However, even though he is no longer in the military, *Feres* still applies to the claims that arose while he was on active duty. See e.g., *Jackson v. Brigle*, 17 F.3d 280, 281 (9th Cir. 1994) (barring action brought by former Air Force Officer) Pet. App. 84a.

3. The court reasoned that the "entire RFPA claim is based upon a subpoena or subpoenas issued to two financial institutions during an Article 32 proceeding investigating charges against him of 42 counts of larceny...and given the Ninth Circuit's decision that no exemption applies, essentially the only question now remaining on remand is one of damages for "willful or intentional" violations. 12 U.S.C. § 3417(a)[.] Pet. App. 88a. And "in order to access possible damages (which could not have been anything related to Marshall Flowers' allegedly "forced" retirement, which was independent of the financial disclosures) the Court could be required to examined the nature of the disciplinary investigation, the need for an Article 32 proceeding, the motives and state of mind of the investigating authorities in issuing the subpoenas to First Hawaiian Bank and Fort Jackson FCU, and other particulars of the process."

4. Lastly, the court considered the Flowers' discovery motions but concluded that "involvement in military affairs and discipline is only exemplified by pending discovery matters, which include whether Marshall Flowers should be allowed to reopen a civil deposition of General James T. Hill,

a four-star General who is currently commander of the Southern Command during a time of military conflict in Afghanistan and Iraq. Pet. App. 89a.

The Flowers' claims against the Bank and Credit Union were dismissed on December 5, 2003. Pet. App. 59a. The court also dismissed the Flowers' Rule 56(f) motion to conduct discovery and complete deposition of a bank employee Pet. App. 61a. Further, the court awarded $100 statutory damages against the bank ruling that genuine issue of material facts did not exist. Pet. App.61a.

5. The U.S Court of Appeals for the Ninth Circuit's (9th Circuit) unpublished memorandum affirmed that "the [district court] conclusion is in accord with... case law, which "broadly construe[s]" *Feres* "to immunize the United States and members of the military from any suit which may intrude in military affairs, second guess[] military decisions, or impair[] military discipline."(quoting *Zaputil v. Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) Pet. App.4a. The 9th Circuit determined the district Court properly dismissed the Flowers' RFPA claims against federal defendants because those claims implicate the concerns that lie in the heart of the *Feres* doctrine.[11] (Quoting Feres, 340 U.S. at 146; see also *United States v. Johnson*, 481 U.S. 681, 691 (1987) ("[A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of military mission.") *Id.*

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[11] Our determination that *Feres* forecloses subject-matter jurisdiction over the RFPA claims directed at the federal defendants renders moot the Flowers' challenge to the district court's denial of their request for additional discovery from Army officials.

6. The questions before this Court is whether the statutory law (RFPA and prevailing regulations) waive the Government's sovereign immunity to protects servicemembers and their families from Army violations of their financial privacy or whether the judicially created *Feres* Doctrine as applied to the RFPA prevails over the authority of congress.

## REASONS FOR GRANTING THE PETITION

### I. THE JUDICIAL IMPORT OF *FERES V. UNITED STATES*, 340 U.S. 135 CANNOT BAR THE FLOWERS' CLAIM UNDER THE RIGHT TO FINANCIAL PRIVACY ACT, § 3416.

This case raises questions of critical importance particularly viewing the district court crafting of *Feres* to reach beyond its original intent. The court's application of judicially created *Feres* disregards RFPA statutory language of Congress and exceeds the court's authority. *Feres*, if allowed to stand deprives member(s) of the Nation Armed Forces and their families and dependants financial privacy afforded all Americans. This decision impacts profoundly on the soldiers' abilities to protect their financial privacy from Army abuses extending *Feres* as a shield that expressly ignores congressional intent. Thus, respectfully, the court's decision is not only tragically flawed but undermines legislative authority to regulate the Nations Armed Forces and constraints placed upon the Army. As the Honorable Supreme Court Justice Brennan expressed in *United States Et. Al. v. Stanley*, "the [court] disregards the command of our Constitution, and bows instead to the purported requirement of a different master, military discipline...[.] *See United States v. Stanley*, 483 U.S.669, 686 (1986). As in this case but less injurious than *Stanley*, the Army deliberately defied law, used and demonstrated unaccountability through *Feres*. The Court

should grant review because this decision is judicially wrong, inconsistent with the 9th Circuit's reasoning in *Flowers*, 295 F.3d 966, the Court of Appeals for the Armed Forces and similar cases in other district courts and courts of appeal ( 4th Circuit, 5th Circuit, 10th Circuit, and D.C. Circuit) and the law.

Consistently, this Court has articulated that a court may only exercise jurisdiction over the Government pursuant to "a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver." *United States* v. *White Mountain Apache Tribe,* 537 U.S.465, 472 (2003). "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187,192 (1996).

**A. The Right to Financial Privacy Act, 12 U.S.C, § 3401 et. seq.**

1. In 1978 Congress passed the Right to financial privacy Act in response to the U.S. Supreme Court decision in *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed. 2d 71 (1976) *See* H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978), which held that a bank customer had no Fourth Amendment expectation of privacy in records of his or her personal bank account. The operative section being that "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution" unless the customer consents (§ 3404) or the government pursues one of the following four procedural options; an administrative subpoena (§ 3405), a search warrant (§ 3406), a judicial subpoena (§ 3407), or a formal written request (§ 3408).12 U.S.C. § 3402. Pet App. 100a. If the government seeks to invoke

one of the options, other than a search warrant, the RFPA contains specific procedures to protect the individual privacy interest. The RFPA defines "Government Authority" broadly as "any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C.§ 3401(3) (1988). The bank customers may challenge a ...subpoena in the "appropriate United States District Court." 12 U.S.C. § 3410(a). Each customer listed on the account must be notified that the government has requested access to his or her records. *See* 12 U.S.C. §§ 3405(2), 3407(2), 3408(4). The " government cannot gain access to a bank customer's financial record or other information without first complying with the notice requirement of the RFPA." *See Adams v. Board of Governors of the Federal Reserve Bd.*, 659 F.Supp. 948, 954 (D. Minn. 1987) *see also Donovan v. National Bank of Alaska*, 696 F.2d 678, 983 (9th Cir.1983).

2. Congress intended the RFPA to "strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations." H.Rep. No. 1383, 95th Cong., 2d Sess. 33, reprinted in 1978 U.S. Code Cong. & Admin. News 9305, *See also United States v. Frazin*, 780 F.2d 1461, 1465 (9th Cir. 1986).

3. The RFPA's civil penalties provision provides that wrongful disclosure of financial records may result in liability for "such punitive damages as the court may allow where the violation is found to have been willful or intentional." 12 U.S.C. § 3417(a)(3) (1989); contra *Waye v. First Citizens National Bank*, 846 F.Supp. 310, 316-17 (M.D. Pa. 1994). Both the financial institution and governmental authority may be held liable for "obtaining or disclosing financial records of information obtained therein in violation of [the RFPA]. 12 U.S.C. 3417(a). "The remedies and sanctions described...

shall be the only authorized judicial remedies and sanctions for violations of this chapter." The customer may recover:

> 1) $100 without regard to the volume of records involved;
> 2) any actual damages sustained by the customer as a result of the disclosure
> 3) such punitive damages as the Court may allow, where the violation is found to have been willful or intentional; and
> 4) in the case of any successful action to enforce liability under this section, the costs of the action and reasonable attorney fees.

*See* 12 § U.S.C. 3417(a). Pet. App. 111a.

The statue provides that "an action to enforce any provision of this chapter may be brought in any appropriate United States district court without regard to the amount in controversy within three years from the date on which the violation occurs or the date of discovery of such violation." *See* § 3416; *see also* § 3417(d). *Id.*

The RFPA set forth a variety of exceptions for other government activities, *see* 12 USC § 3413, but provides no exemption for the Department of Defense in general or for military disciplinary matters in particular. Cf. e.g. 5 USC § 551(1)(F) (exclusion of courts-martial from coverage under the generally applicable provisions of the Administrative Procedures Act.) *United States v. Dowty*, 48 M.J. at 108, *see* 32 C.F.R. § 504.2 (k), *see also* AR 190-6, para 2-11.

**B. The RFPA and Its Application to National Defense-Title 32 Code of Federal Regulation ("CFR") Parts 275 and 504 (1998)-Obtaining Information From Financial Institutions**

1. Title 32 Code of Federal Regulation (C.F.R.) § 275 (1998) implemented the RFPA and prescribes procedures for Department of Defense to use to gain access to financial records maintained by financial institutions. *See* § 275.1. *see also* § 275.2 (a). (obligating provisions of this part to apply the Office of the Secretary of Defense and military departments, the Defense investigative Service, etc.) Pet. App. 114a.

2. Title 32 C.F.R. § 504.1 provides Department of the Army (DA) policies, and restrictions governing access to and disclosure of financial records maintained by financial institutions during the conduct of Army investigations. *See* § 504.1(a). Army investigative elements may not have access to or obtain copies of the information in the financial records of any customer from a financial institution unless the financial records are reasonable described and ...financial records are disclosed in response to a judicial subpoena which meets the requirements of § 504.2(e) (Judicial subpoenas (Includes subpoenas issued under Para 115 of the Manual for Courts- Martial and Article 46 of the Uniform Code of Military Justice...the notice and challenge provision of 12 U.S.C.3407 and 3410 will be followed). (emphasis added). *See* § 504.1(d)(2)

Section 504.2 (k) states "[a] certificate of compliance with the Right to Financial Privacy of 1978 (app. C) will be provided the financial institution as a perquisite to obtaining access to financial records under the following access procedures: (3) Judicial subpoena (§ 504.2(e)); and 504.2(l)-

Penalties states that "[o]btaining or disclosing financial records or financial information on a customer from a financial institution in violation of the act or this regulation may subject the Army to civil penalties, actual damages, as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the act or this regulation may be subject to disciplinary actions). Pet. App. 132a-133a.

Also, the Department of Defense (DoD) published DOD Directive (DODD 5400.12, Obtaining Information from Financial Institutions, 6 February 1980; Change 1 to DODD 5400.12, 23 April 1981 that implemented Title 12, United States Code, Public Law 95-630, Right to Financial Privacy Act of 1978. It sets forth policy for Department of the Army to obtain information on a customer's financial records from a financial institution. Further supplemented Army Regulation (AR) 190-6 (15 January 1982), Obtaining Information from Financial Institutions prescribing procedures to obtain financial information. Pet. App. 142a-161a.

**C. The Federal Tort Claims Act ("FTCA")**

1. The Federal Tort Claims Act (FTCA, August 2, 1946, ch. 753, title IV, 60 Stat. 842, 28 U.S.C. § 1346(b) and 28 U.S.C. §§ 2671-2680), is a statute enacted by the United States Congress in 1946 permitting private parties to sue the United States in a federal court for most torts committed by persons acting on behalf of the United States. Liability under the FTCA is limited to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 2674. Congress vested the federal district court with exclusive jurisdiction to hear such tort claims, *ibid.*, and provided that the United States shall be

liable "in the same manner and to the same extent as a private individual under like circumstances.." 28 U.S.C. § 2674. The FTCA contains several exceptions to this limited waiver of sovereign immunity. *See* 28 U.S.C. § 2680(a)-(n); 28U.S.C. 1346(b)(1) (incorporating "the provisions of Chapter 171," i.e.28 U.S.C. § 2671 et seq.)"It is well settled that the United States enjoys sovereign immunity from suits and accordingly, may be sued only if it has waived that immunity." *United States v. Idaho ex rel. Dep't of Water Resources*, 113 S. Ct. 1893, 1896, (1993). Only the United States may be sued under the FTCA and before an action may be filed under the FTCA, an administrative claim to the appropriate agency is a jurisdictional requirement predicated upon 28 U.S.C. § 1346(b). Additionally, an administrative claim must be presented to the federal agency employing the person whose act or omission caused the injury. *McNiel v. United States*, 508 U.S. 106, 113 S.Ct. 1980 (1993); *Meridian Intern. Logistics, Inc. v. United States*, 939 F.2d 740 (9th Cir. 1991) 28 U.S.C. § 2675.

**D. The *Feres* Doctrine (*Feres v. United States*, 340 U.S. 135 (1950)).**

1. Shortly after enactment of the FTCA, *Brooks v. United States*, 337 U.S. 49 (1949) was decided. Two servicemen and their father were driving on a public road when an Army truck struck them. The government moved to dismiss for lack of jurisdiction, arguing that because the brothers were in the Army, claims arising from their injuries and death were excepted from the FTCA. The Court rejected the argument. "The statue terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen." *Id.* at 51 (emphasis in original). The accident explained the Court, "had

nothing to do with the [brothers] Army careers...except in a small sense that all human events depend on what already transpired. *Id.* Almost a year after Brooks, the Court decided *Feres v. United States*, 340 U.S. 135 (1950). Two of the three consolidated cases involved claims of medical malpractice; the third was a wrongful death claim arising out of a soldier's death in a barracks fire. Deciding that none of the claims should have been permitted to go forward, the *Feres* Court held that in addition to the exceptions specified by Congress in the FTCA, Congress intended to exempt all tort claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

2. Over thirty-five years later, in *Chappel v. Wallace*, 462 U.S. 296 (1983), the Supreme Court extended this "*Feres* doctrine" to bar military personnel from bringing *Bivens* actions to recover damages for constitutional torts committed by superior officers. *See id.* at 304. See generally *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)(authorizing damages actions against federal officials who engage in unconstitutional conduct). In *United States v. Johnson*, 481 U.S. 681 (1987), four dissenting Justices criticized *Feres* as "wrongly decided and heartily deserv[ing] the widespread, almost universal criticism it has received. *Id.* at 701( Scalia, J., joined by Brennan, Marshall, and Stevens, JJ.) (internal quotation marks omitted).

Quite the contrary, the FTCA and Feres are inapplicable to the RFPA and its requirements.

## II. THE COURT SHOULD GRANT CERTIORARI BECAUSE §§ 3416, 3417(a) AND 32 C.F.R.§ 504.2 (1998) WAIVES THE GOVERNMENT SOVEREIGN IMMUNITY AND PROVIDE FOR PENALTIES FOR WILLFUL AND INTENTIONAL VIOLATIONS OF THE ACT.

This Court should grant review since Congress unambiguously expressed its intent through Title 12 U.S.C. § 3416 that grants jurisdiction to the Federal Courts to hear any action to enforce a provision of the bill [RFPA], providing a three years statue of limitations for actions brought under it. Also, expressed clearly under 32 CFR Part 504.2 (l) that states:

> Obtaining or disclosing financial records or financial information on a customer from a financial institution in violation of the act or this regulation may subject the Army to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the act or this regulation may be subject to disciplinary action.

*See* § 504.2(l). Pet. App. 133a. *see also* AR 190-6, para 2-12 (15 January 1982). Pet. App.159a-160a.

Where the language of a statue or regulation is plain and unambiguous, and the literal application of the language would not produce an absurd or unjust result, and the language is clearly consistent with the purposes and policy of the statue or regulation, the circuit court reconstruction of the RFPA is inappropriate.

## III. THE NINTH CIRCUIT'S TEST FOR DETERMINING WHAT CONSTITUTES "ACTIVITY INCIDENT TO SERVICE" AND ITS HOLDING THAT *FERES* BARS PETITIONERS RFPA CLAIMS CONFLICTS WITH DECISIONS OF OTHER COURTS CIRCUITS.

1. The decision of the 9th Circuit Court conflicts with other courts' interpretation that the RFPA unequivocally waives government sovereign immunity. The appeals court expansion of *Feres* to the RFPA allows an unaccountable Government authority to use back door tactics to access financial record. A tactic clearly inconsistent with the civil penalty provision.

2. In the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) the court addressed how comprehensive statues of general application become incorporated into the military justice system. In *United States v. Dowty*, the C.A.A.F analyzed the RFPA, 12 U.S.C. §§ 3401-3422 stating that:

> Under the Constitution, "Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." Quoting *Weiss v. United States*, 510 U.S. 163, 177, 114 S.Ct. 752, 760, 127 L. Ed. 2d 1 (1994); *see* U.S. Const., Art. I, § 8, cl. 14. While members of the armed forces are not excluded from the protections of the Constitution, "the different character of the military community and the military mission requires a different application of those protections" quoting *Parker v. Levy*, 417 S.Ct. 2547, 2563, 41 L.Ed. 2d 439 (1974). While members of the armed forces do not enjoy the full panoply of constitutional and statutory rights available to others, they are no less citizens of the United States. In

> absence of a valid military purpose requiring a different result, generally applicable statues normally are available to protect servicemembers in their personal affairs. Cf. para. 14c(2)(a)(iii), Part IV, Manual for Courts-Martial, United States (1995).

*See United States v. Dowty*, 48 M.J.102, 107 (1998).

The C.A.A.F. recognized the Uniform Code of Military Justice as a special, well integrated statue and exercised caution in overlaying a generally applicable statue specifically onto the military system. But the court noted "[u]nder the circumstances...we note the unambiguous language in RFPA; the circumstances of the legislative history; the contemporaneous implementation of the RFPA by the Department of Defense and military departments; and judicial application of the RFPA generally to servicemembers. We decline now to deprive personnel of these important privacy rights...[.]" *Id.* at 111.

3. In its final analysis, the Court concluded that "the Department of Defense has not attempted to exclude military personnel from protections of the Act and that ' following enactment of the legislation, DoD issued a regulation that "implements" the RFPA. Department of Defense Directive 5400.12, "Obtaining Information from Financial Institutions," § A (Feb 6, 1980). *Id.* "As a matter of law...the RFPA has covered applicable financial records of members of the armed forces since it was enacted in 1978. *Dowty*, 48 M.J. at 109. The C.A.A.F determined that DoD did not attempted to exclude military personnel from [RFPA] protections but following enactment of the legislation, DoD issued a regulation that "implements" the RFPA; Department of Defense Directive 5400.12, "Obtaining Information from Financial Institutions," § A (Feb 6, 1980). *Id.* at 107.

4. Other courts have similarly recognized compulsory procedures for Army compliance with the RFPA. In *Duncan v. Belcher*, 813 F.2d 1335 (4th Circuit) LTC Duncan and spouse sued the Department of the Army for violation of their Rights to Financial Privacy, 12 U.S.C.§§ 3401 et. seq., when the Army examined their American Express card without their consent. Their suit asked for statutory, compensatory and punitive damages. *Id.* at 1337. At the close of Duncans' evidence, the district court, sitting without a jury, granted defendant's dismissal. The Duncans appealed. The Army's argued that application of the Act [RFPA] in cases such as this will interfere with military discipline and law enforcement in general. But the appealed court acknowledged, that, "[t]he most salient feature of the Act is the narrow scope of the entitlement it creates." *Securities and Exchange Commissioner v. Jerry T. O'Brien, Inc.*, 467 U.S.735, 745, 104 S.Ct.2720, 2726, 81 L.Ed 2d 615 (1984). *Id.* at 1339 and decline to accept the Army's argument, holding that "[t]he act's provision hardly insulate private accounts from investigation by government agencies...the Act merely establishes summary procedures for government investigators to follow." *Id.* The court concluded, "If the government is found liable under the Act, plaintiffs are entitled to $100 statutory damages regardless of whether they prove actual damages.12 U.S.C.§ 3417(a)." *Id.* at 1339. "The district court finding of no liability was therefore in error." *Id.*

Quite clearly § 3416 vest jurisdiction in "any U.S. District Court." *See* 12 U.S.C. § 3416. *See also McDonough v. Windall*, 891 F. Supp. 1439, 1448-1449 (D. Colo.1995) (Jurisdiction over RFPA matters is vested exclusively in Article III courts." § 3416 [and] [t]he RFPA provides the "sole judicial remedies and sanctions for violation of this chapter." 12 U.S.C. § 3417(d)); the question whether and what McDonough may recover under the provisions of

§ 3417(a) remains for another day."); *United States v. Wooten*, M.J. 141 (CMA 1992)(alleged violations of the RFPA are within the jurisdiction of Article III Courts and not the military justice system." *Id.* citing 12 U.S.C.§ 3416.); *Anderson v. La Junta State Bank*, 115F.3d 756 (10th Cir. 1997) (If the government or a financial institution violates the RFPA, the customer whose financial records were disclosed is entitled to $100, regardless of the volume of records involved. *Id.* § 3417(a); *Taylor v. Department of the Air Force*, 18 F. Supp. 2d. 1184, 1188 (The civil penalties provides that disclosure of financial records in violation of the RFPA may result in liability for "such punitive damages as the Court may allow, where the violation is found to have been willful or intentional." 12 U.S.C.§ 3417(a)(3)).

5. As is Flowers *Cummings v. Department of the Navy*, 279 F.3d 1051 (D.C. 2002) was a case of first impression. Cummings sued the Navy in the U.S. District Court for the District of Columbia alleging that the Navy released a copy of a report to an author evaluating her flying abilities and potential in violation of the Privacy Act. The Navy moved to dismiss Cummings' claim based upon *Feres* and the district court dismissed holding that the Navy's release of Cummings Evaluation Report "was incident to service." *Id.* at 1053. Cummings appealed. The question before the U.S Court of Appeals, District of Columbia Circuit (D.C. Cir.) was whether members of the Armed Forces may sue the military for damages under the privacy act. By analyzing the statue, the court started with 'cardinal' cannon of statutory construction: "Courts must presume that [the Congress] says in a statue what it means and means in a statue what it says." Quoting *Comm. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed2d. 391 (1992) (citation omitted)."When the words of a statue are unambiguous, then, this first cannon is also last: Judicial inquiry is complete.'" *Id.*

at 254, 112 S.Ct.1146, 1149 (Quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981). After the court's analysis as to whom application of the act applied to "military departments" and certain provisions of the act that manifested congressional intent to protect uniform personnel like Cummings, the appeals Court concluded that "Congress unambiguously intended to establish a duty that runs from a "military department" (like the Navy) to military personnel (like Cummings) not to "disclose any record which is contained in its system of records" (like Cummings evaluation reports. *Id.* at 1054. The Act ...demonstrates that the Congress did not intend the Courts to craft additional exemptions from coverage based upon the type of relief a service-woman request (i.e., by limiting suits to equitable relief only) quoting *Fawn Mining Corp v. Hudson*, 80 F.3d 519, 523 (D.C. Cir. 1996) ("Neither lawyers nor judges serves as back-seat lawmakers who may extend statues beyond their bounds or change the rules that Congress has set.") *Id.* "Waivers of sovereign immunity must be unequivocally expressed and narrowly construed." *Cummings*, 116 F.Supp. 2d at 81 (Quoting *Dorsey v. Dep't of Labor*, 41 F.3d 1551, 1555 (D.C. Cir. 1994).

6. Quite frankly, the court has extended *Feres* beyond its bounds, changed RFPA rules implemented for "military departments" under Title 32 C.F.R. § 275.1. *See* 32 C.F.R. § 275.2(a). Pet. App. 114a. *See also* 32 C.F.R. § 504.1(b)(This regulation applies to all DA investigative activities conducted by the active Army. Pet. App. 118a.) The Government in its motion to dismiss argues:

> Ruling in favor of the government here does not mean military personnel have no right to financial privacy. The question is whether they should have a right to sue for damages for violations if the violations

> occurred "incident to service. A finding against Marshall Flowers does not bar an action for violation of the RFPA if the disclosure occurred in other circumstances. It also would not bar claims for damages against financial institutions such as FHB and FJFCU. Pet. App. 91a-92a.

8. Respectfully, this argument lacks merit and ignores "statues and [regulations] say what they mean and mean what they say." Thus, it imports judicially created Feres to deny rights protected by the act. The answer to the Government question "whether... [the Flowers] should have a right to sue for damages for [RFPA] violations" is answered by the D.C. Cir. "Neither lawyers nor judges serves as back-seat lawmakers who may extend statues beyond their bounds or change the rules that Congress has set." quoting of *Fawn Mining Corp*, 80 F.3d at 523. *Cummings*, 279 F.3d at 1054 ("When the words of a statue are unambiguous, then, this first cannon is also last: Judicial inquiry is complete").

## IV. THE DISTRICT COURT'S APPLICATION OF FERES DENIED DISCOVERY AND IMPROPERLY GRANTED SUMMARY JUDGMENT TO THE FINANCIAL INSTITUTIONS

This Court should grant review since the court's import of *Feres* prohibited the Flowers from obtaining discovery of federal witnesses to adequately respond to the financial institutions motions for summary judgment. Pet. App.96a-97a. The Government's argument that discovery for the Flowers would require the court to interfere with "military discipline," contradicted the government use of federal defendants' depositions (minus cross-examination) that provided financial institutions with unchallenged prejudicial evidence which substantially violated procedural due process.

1. Discovery is integral to litigate RFPA claims for damages whereas the court restricted discovery and the Flowers' Rule 56(f) motion. This denial significantly prejudice and impacted upon Flowers' ability to litigate damages. The 9th Cir. decision in *Flowers I* states uncategorically the First Hawaiian Bank ("bank) violated the act but the district court unreasonably restricted access to discovery that prohibited depositions of federal defendant and witnesses, particularly, Capt. John Ohlweiler and former 25th Infantry Division Commander, General James Hill. This absence of equal access to discovery violated due process and restricted their claims for compensatory and punitive damages.

**A. Standard for Summary Judgment**

(1) Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986).

(2) The jurisdiction of the lower court was pursuant to 12 USC § 3416. The government's 12 (b) motion and district court consideration of Feres should have been converted into summary judgment since a Rule 12(b)(1) motion does not consider matters outside the pleading, the motion can only test legal issues and not matters of fact. *See Rivera City of LA*, 159 F.3d 470,477 (9th Cir. 1998); Fed. R. Civ. P. 12 (b). Given the fact, the Flowers should have been given reasonable

opportunity to present all material made pertinent to such a motion.

(3) As a general rule, the Court "may not consider any material beyond the pleadings in ruling on a Rule 12 (b) motion. *Lee v.City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Rule 12 (b) expressly provides that "when matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12 (b) (6) (emphasis added).

2. Even arguendo *Feres* precluded a servicemembers RFPA claims against the Army and not the financial institutions, the imposition of *Feres* in any case present prejudicial barriers to soldiers' ability to litigate against financial institutions. As in this case *Feres* shields the Army and financial institutions from liability by restricting the Flowers' ability to questioning and cross examination of federal defendants.

Title 32 C.F.R. § 504 protects soldiers and their families' financial privacy and the Army violation presented the Flowers with a cause of action in the U.S. District Court. *See* 12 U.S.C. § 3416. The financial institutions were required to obtain a certificate of compliance from the Army before release of the financial records.12 U.S.C. § 3403(b). *see also* § 504.2(k) (A certificate of compliance... will be provided to the financial institution as a prerequisite to obtaining access to financial records under...Judicial subpoenas(§ 504.2(e)) (emphasis added). Neither financial institutions obtained the required certificate of compliance but responded to oral communication and provided the Flowers financial record.

4. In Petitioner's appeal to the Ninth Circuit, questions relative to "due process' regarding discovery (Rule 56f) were before the panel but dismissed as questions without merit. As means of denying the Flowers discovery, the government argued that the district court involvement in military affairs and discipline is only exemplified by the pending discovery matters, which include whether Marshall Flowers should be allowed to reopen a civil deposition of General James Hill, a four star General... during a time of military conflict in Afghanistan and Iraq. In support the district court concludes:

> His (General Hill) testimony to date includes reasons for the Article 32, the Subsequent recommendation for seeking a general court-martial against Flowers, and some of the reasons for the agreement between Flowers and the Army to accept non-judicial punishment (an Article 15)and to seek immediate retirement in lieu of the Army's proceeding with a General Court-martial. In short *Feres* appears applicable here where all indications are that Marshall K. Flowers is entitled to, at most, $100 statutory damages.

*Flowers*, 289 F. Supp. at 1219

5. Rule 56(f) of Federal Rules of Civil Procedure gives trial court judges discretion to allow discovery prior to the grant of summary judgment where "it appear(s) from the affidavit of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition. We believe the district judge abuses his discretion by denying the Flowers' Rule 56(f) motion and granting the financial institutions summary judgment.

6. The district court first dismissed the plaintiffs' claims against Fort Jackson under the RFPA pursuant to 12 U.S.C. § 3413(e), which provides that "[n]othing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules in other courts in connection with litigation to which the Government authority and the customer are parties."

7. On appeal, Petitioners argued that the exception in § 3413 does not apply, and that their complaint is facially valid because it alleges that the government did not satisfy the requirements of 12 U.S.C. § 3402 or " rules of comparable Court" (Manual for Court Martial, Code of Federal Regulation, part 504.1 (1998) or AR 190-6 (1995)). The exception in § 3413(e) states that the requirements of the chapter will not apply when the financial records sought by the government are pursued "in connection with litigation to which the Government authority and the customer are parties."

The Flowers were not parties to any litigation with the government, the credit union failed to obtain a certificate of compliance and summary judgments and cost to the Credit Union was therefore in error. *See* § 504.2(K)(3).

## CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted and the judgment should be reversed.

Respectfully submitted,

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**No. 04-16143**
**D.C. Nos. CV-99-00335-SPK and CV-01-00412-SPK**

MARSHALL KENNETH FLOWERS et al.,
Plaintiffs - Appellants,

v.

UNITED STATES ARMY, 25th Infantry Division, et al.,
Defendants - Appellees.

### ORDER

Before: THOMPSON and CALLAHAN, Circuit Judges, and MILLER, District Judge*

The appellants' petition for panel rehearing and petition for rehearing en banc are hereby DENIED.

* The Honorable Jeffrey T. Miller, United States District Judge for the Southern District of California, sitting by designation.

## APPENDIX B

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 04-16153**
**D.C. Nos. CV-99-00335-SPK**

**[Filed May 3, 2006]**

| | |
|---|---|
| MARSHALL KENNETH FLOWERS; ANNA FLOWERS, Plaintiffs - Appellants, | ) |
| v. | ) |
| UNITED STATES ARMY, 25th Infantry Division; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHL WEILER, Major, Defendants - Appellees. | ) |

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, Senior Judge, Presiding

## MEMORANDUM*

Submitted April 7, 2006**
San Francisco, California

Before: THOMPSON and CALLAHAN, Circuit Judges, and MILLER, District Judge***

Husband and wife Marshall and Anna Flowers appeal *pro se* the district court's dismissal of their claims against the United States Army and the individual Army defendants ("federal defendants"), and grant of summary judgment in favor of Fort Jackson Federal Credit Union and First Hawaiian Bank. The Flowers also challenge various discovery and other procedural rulings made by the district court. We affirm the challenged rulings and deny the Flowers' two pending motions.

**1.** The Flowers argue that the district court erred in dismissing their claims brought pursuant to the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 *et seq.*, against the federal defendants. The district court based its dismissal on the doctrine enunciated in *Feres v. United States,* 340 U.S. 135, 146, 71 S. Ct. 153, 95 L. Ed. 152 (1950), which held that service members cannot sue the government

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See FED. R. APP. P. 34(a)(2).

*** The Honorable Jeffrey T. Miller, United States District Judge for the Southern District of California, sitting by designation.

for injuries that "arise out of or are in the course of activity incident to service." We must determine whether the district court had subject-matter jurisdiction over the Flowers' RFPA claims against the federal defendants. *See Dreier v. United States,* 106 F.3d 844, 847 (9th Cir. 1997) ("A motion to dismiss pursuant to the *Feres* doctrine is properly treated as a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction[.]"). We review de novo whether the *Feres* doctrine applies to the facts in the record. *Wilkins v. United States,* 279 F.3d 782, 785 (9th Cir. 2002).

The district court concluded that the Supreme Court's decision in *Feres* bars the Flowers' claims against the federal defendants because those claims would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States. This conclusion is in accord with our case law, which "broadly construes" *Feres* "to immunize the United States and members of the military from *any* suit which may intrude in military affairs, second-guess[] military decisions, or impair[] military discipline." *Zaputil v. Cowgill,* 335 F.3d 885, 887 (9th Cir. 2003) (internal quotation marks omitted) (emphasis and alterations in original). Accordingly, the district court properly dismissed the Flowers' RFPA claims against the federal defendants because those claims implicate the concerns that lie at the heart of the *Feres* doctrine.[1] *Feres,* 340 U.S. at 146; *see also United States v. Johnson,* 481 U.S. 681, 691, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987) ("[A] suit based upon service-related activity

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[1] Our determination that *Feres* forecloses subject-matter jurisdiction over the RFPA claims directed at the federal defendants renders moot the Flowers' challenge to the district court's denial of their request for additional discovery from Army officials.

necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.").

**2.** The Flowers also argue that the district court erred in granting summary judgment to the bank and credit union. We review a grant of summary judgment de novo and may affirm on any basis presented in the record, construing the evidence in the light most favorable to the nonmoving party. *Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). A grant of summary judgment is appropriate only where the moving party has demonstrated that there is no genuine issue of material fact. *Id.;* FED. R. CIV. P. 56(c). Once the moving party demonstrates the absence of a genuine issue of material fact, the nonmoving party that bears the ultimate burden at trial must show that there is evidence creating a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The record shows that the Flowers failed to produce or cite any evidence to establish a genuine issue of material fact sufficient to overcome summary judgment. The record establishes that the credit union is not liable under the RFPA because the subpoena issued to the credit union satisfies an exception to liability under 12 U.S.C. § 3413(e).[2] There is also no indication that the Flowers are entitled to compensatory or punitive damages as the record evidence provides no connection between the conduct of the bank or the credit union and the Flowers' claimed damages, and

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[2] The protections of the RFPA do not "apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties." 12 U.S.C. § 3413(e).

nothing suggests that the bank or the credit union acted willfully or intentionally to violate the Flowers' rights under the RFPA. 12 U.S.C. § 3417(a)(3). Furthermore, the Flowers' tort claims against the credit union lack any evidentiary support in the record. We must therefore conclude that the district court did not err in granting summary judgment to the bank and the credit union.

**3.** The Flowers next contend that the district court abused its discretion in denying their Rule 59(e) motion for reconsideration and in making various discovery and procedural rulings. The district court did not abuse its discretion because the motion failed to set forth any of the allowable grounds for reconsideration. *See* FED. R. CIV. P. 59(e). As to the Flowers' argument that the district court should have permitted them to amend their complaint a third time in order to add a claim challenging the military's search of their residence under the Fourth Amendment, we agree with the district court that such an amendment would have been futile because the proposed claim appears to be barred by the *Feres* doctrine based on the same rationale precluding subject-matter jurisdiction over the Flowers' other claims against the federal defendants. *See Newland v. Dalton,* 81 F.3d 904, 907 (9th Cir. 1996) (holding that "district courts need not accommodate futile amendments"). Further, the Flowers' objection to the withdrawal of their counsel, attorney Brown, is in vain because the record reveals that the Flowers fired Brown. We have considered the Flowers' remaining miscellaneous contentions -- including the Flowers' assertion that the district court improperly considered exhibits that the bank submitted in support of its summary-judgment motion and the Flowers' challenge to a number of the district court's discovery rulings -- and we conclude that they are also without merit.

**4.** Finally, we deny the Flowers' motions to strike the federal defendants' answering brief and to compel government counsel's compliance with the Federal Rules of Appellate Procedure. The first motion is founded on the false premise that the Department of Justice is not permitted to represent the federal defendants on appeal. While the second motion notes an apparent failure by government counsel to comply with certain procedural rules for serving documents on opposing parties, the Flowers have not demonstrated any injury or prejudice resulting therefrom.

For all of the foregoing reasons, the district court's decisions are **AFFIRMED** and the pending motions are **DENIED**.

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed May 11, 2004]**

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

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MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

**ORDER ADOPTING IN PART AND MODIFYING IN PART REPORT OF SPECIAL MASTER ON PLAINTIFFS' MOTION FOR ATTORNEY FEES AND NON-TABLE COST (sic)**

On March 19, 2004, United States Magistrate Judge Kevin Chang, acting as special master pursuant to L.R. 53.1, issued a special master report recommending that Plaintiffs Marshall and Anna Flowers ("Plaintiffs") be awarded attorneys' fees of $13,500.82 and costs of $3,524.45 against Defendant First Hawaiian Bank ("First Hawaiian"). Plaintiff's filed a motion for reconsideration with Judge Chang, which he denied on April 13, 2004.

Plaintiffs and First Hawaiian have both filed objections pursuant to Fed. R. Civ. P. 53(g)(2) (2003).

Plaintiffs seek additional fees, contending that the fee award was too low. In addition to objecting to the amount of reductions, they also contend that they are prevailing parties not only as to claims against First Hawaiian, but also as to Defendants Fort Jackson Federal Credit Union ("Fort Jackson FCU") and the United States Army. Marshall Flowers also seeks fees for representing his wife.

First Hawaiian also objects, contending that the fee award was too high. It contends that many of Plaintiffs' submissions were inadequately documented, pertained to work against the United States Army, or should not be awarded because of limited success (in April of 2003, First Hawaiian and the Army appropriately admitted liability for a technical violation of the Right to Financial Privacy, leaving the primary issue as Plaintiffs' damages -- an issue upon which First Hawaiian substantially prevailed as the Court ultimately awarded only

$200 in statutory damages and nothing for actual or punitive damages).

The Court reviews factual findings and legal conclusions of a special master de novo. *See* Fed. R. Civ. P. 53(g)(3) & (4). Procedural matters are reviewed for an abuse of discretion. *See* Fed. R. Civ. P. 53(g)(5).

I.

The Court OVERRULES Plaintiffs' objections. Marshall Flowers is not an attorney and is not entitled to attorneys' fees, either for himself or for his wife, even if he was allowed for administrative reasons to speak in limited circumstances on behalf of his wife. *See Kay v. Ehrler*, 499 U.S. 432, 435 (1991).

Plaintiffs are not entitled to fees incurred by attorneys for work strictly against Fort Jackson FCU or the Army. Fort Jackson FCU and the Army prevailed on claims brought by Plaintiffs. Plaintiffs recovered no damages against them and achieved no equitable relief. Plaintiffs cannot be considered prevailing parties as to claims against Fort Jackson FCU and the Army. Although the litigation against all three defendants was interrelated and there necessarily was some overlap in fees incurred against all three, upon de novo review, the Court is satisfied that Judge Chang made appropriate reductions in allocations for work against Fort Jackson FCU and the Army, as well as for work that was inadequately documented or was excessive. Indeed, Judge Chang appears to have been quite generous to Plaintiffs in making his fee award, considering the limited extent of relief ($200 in statutory damages) obtained against First Hawaiian.

## II.

The Court also OVERRULES First Hawaiian's objections regarding the amount of fees. Upon de novo review, the Court is satisfied that Judge Chang made appropriate reductions to reflect limited success and because of inadequately documented or excessive work. Given the nature of the financial disclosures, some work, even for claims against the Army, was sufficiently intertwined with claims against First Hawaiian. And even if some of the fees were apparently incurred after April 9, 2003 (when Defendant First Hawaiian and the Army admitted liability for technical RFPA violations), Plaintiffs are entitled to a limited portion of those fees incurred in "prevailing" against First Hawaiian. "Success in a lawsuit is not always measured by the formal relief obtained." *Clark v. City of Los Angeles*, 803 F.2d 987, 990 (9th Cir.1986) (citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980)). There need not be a perfect relationship between relief sought and relief obtained. *See e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983) ("There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.").

## III.

The Court, however, SUSTAINS First Hawaiian's objections to the award of costs to Plaintiffs, insofar as First Hawaiian relies upon its offer of judgment under Fed. R. Civ. P. 68. First Hawaiian made a formal offer of judgment under Rule 68 on April 21, 2003, after it formally admitted to violations of the RFPA. The offer was to allow a total sum of $30,000 to be taken against it inclusive of fees and costs.

Plaintiffs rejected the offer. Plaintiffs ultimately recovered much less than $30,000 ($200 in statutory damages, plus about $14,000 in attorney fees and costs).

Rule 68 provides, in pertinent part that "If the judgment finally obtained by the offeree [Plaintiffs] is not more favorable than the offer [by First Hawaiian], the offeree [Plaintiffs] must pay the costs incurred after the making of the offer." Importantly, the Ninth Circuit (and other circuits) have stressed that "The award [of costs] is mandatory; Rule 68 leaves no room for the court's discretion." *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 859 (9th Cir. 1996) (citation omitted); *see also Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997).[1] Under Rule 68, because Plaintiffs did not ultimately obtain a higher judgment than $30,000, they are not entitled to any of their costs as a prevailing party incurred after April 21, 2003. *See Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993) ("Rule 68 precluded the [prevailing party] from recovering

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[1] The Court has also considered reducing the attorneys' fees under Rule 68. If the statute allowing for attorneys' fees (in this case, 12 U.S.C. § 3417(a)(4)) defines "costs" as to include attorneys' fees, then the attorneys' fees would be subject to a similar reduction. *See e.g.*, *Marek v. Chesney*, 473 U.S. 1, 9 (1985) ("Since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68"). The RFPA, however, does not include attorney's fees as costs. *See Haworth v. State of Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995) ("unlike attorney fees in a section 1983 action, attorney fees in an FLSA action [like in the RFPA] are not automatically shifted by Rule 68"). Thus, attorney fees claimed by Plaintiffs incurred after April 2003 are not subject to Rule 68's reductions.

that portion of their costs and fees related to work performed after the date of the [Defendant's better] offer").[2]

Similarly, even if the Court were to consider Plaintiffs' "supplemental bill of costs" filed (late) on March 26, 2004, all those costs were incurred after April 2003 and would not be recoverable.

The Court therefore REDUCES the award of costs. Plaintiffs may not recover $1299.49 for the October 29, 2003 and November 20, 2003 deposition charges (invoices for depositions of Leanne Nakasone and Von Dell Waiwaiole-Cabos), $108.33 for tape transcription and binders (incurred on August 26, 2003), and $1604.20 for copying charges. (The Court calculates the charges by reducing for 16042 copies from August 2003 to January 2004, as reflected in Plaintiffs form AO 133 submitted on January 29, 2004, multiplied by 10 cents per copy).

Plaintiffs had claimed a total of 26131 copies on their AO 133. Reducing for 16042 copies leaves 10089 copies. Multiplying 10089 by 10 cents results in a charge of $1008.90 for copies. The Court concludes that this amount should be reduced by 2/3rds because Plaintiffs prevailed against only one of three defendants. This leaves a charge of $336.30 for copies necessarily incurred against First Hawaiian.

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[2] Under Rule 68, Plaintiffs might also have been assessed *First Hawaiian's* post offer costs as well. *See Haworth*, 56 F.3d at 1052 ("Because [defendant] made valid Rule 68 offers of judgment and the final judgment against it was less than the amount offered, the plaintiffs must bear their own costs of suit, as well as [defendant's] costs, incurred after the Rule 68 offers were made."). No request for costs was filed by First Hawaiian.

The cost award is $150 for clerk fees and $336.30 for copies, totaling $486.30.

## CONCLUSION

The March 19, 2004, report of the special master is adopted in part and modified in part. Plaintiffs are awarded attorneys' fees of $13,500.82 and costs of $486.30. An amended judgment shall issue in favor of Plaintiffs and against First Hawaiian Bank to reflect the award of fees and costs, as well as statutory damages of $200.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, May 11, 2004.

/s/ _____
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

## APPENDIX D

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed April 13, 2004]**

MARSHALL KENNETH FLOWERS,
Plaintiff,
v.

UNITED STATES DEPARTMENT OF THE ARMY; and FIRST HAWAIIAN BANK,
Defendants.

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MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,
v.

DEPARTMENT OF THE ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

## ORDER DENYING PLAINTIFFS MARSHALL K. FLOWERS AND ANNA FLOWERS' MOTION FOR RECONSIDERATION

On March 26, 2004, Plaintiffs Marshall K. Flowers and Anna Flowers ("Plaintiffs") filed "Plaintiffs Marshall K. Flowers and Anna Flowers' Motion for Reconsideration of the US Magistrate Judge's Report of the Special Master on Plaintiffs' Motion for Attorney Fees and Non-Taxable Cost" ("Motion"), a Supplemental Bill of Cost and Plaintiffs (sic) Marshall K. Flowers Supplemental Memorandum in Support of Attorney Fees Incurred by Plaintiffs Marshall K. Flowers and Anna Flowers. On April 6, 2004, Defendant First Hawaiian Bank ("Defendant First Hawaiian") filed its Memorandum in Opposition to the Motion and its objections to Plaintiffs' Supplemental Bill of Costs. Plaintiffs seek the reconsideration of the attorneys' fees award in the amount of $13,500.82 and the taxable costs allowed of $3,524.45.

### DISCUSSION

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. *See Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291, 1292 (9th Cir. 1982). There is a "compelling interest in the finality of judgments which should not be lightly disregarded." *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983).

It is well settled in the Ninth Circuit that a successful motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate reasons why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its

prior decision. *See Great Hawaiian Fin. Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987) (citations omitted), *rev'd on other grounds*, 863 F.2d 617 (9th Cir. 1988). Courts have established three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice. *See id.*, and Rule 60.1 of the Local Rules of Practice for the District of Hawaii ("L.R.").

Mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572 (D. Haw. 1988). A party moving for reconsideration cannot merely reargue facts and legal arguments that were previously submitted to the court. *See, e.g., Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1988). Furthermore, reconsideration may not be based on evidence and legal arguments that could have been presented at the time of the challenged decision. *See All Hawaii Tours, Corp. v. Polynesian Cultural Ctr.*, 116 F.R.D. 645, 649-50 (D. Haw. 1987), *rev'd on other grounds*, 863 F.2d 617 (9th Cir. 1988).

Plaintiffs make several arguments for reconsideration, however none of the arguments cite any authority or raise anything which satisfy the requirements for reconsideration of the Report of the Special Master. Plaintiffs do not point to an intervening change in controlling law relevant to the issues addressed in the Report of the Special Master and to the discovery of new evidence that was not previously available. Plaintiffs provide the September 2003 detailed billing statements and a Supplemental Bill of Costs to support their request for reconsideration, but Plaintiffs fail to explain why this information was not or could not have been presented as part of their original motion. Also, with regard to the Court's

denial of the cost incurred by Plaintiff to produce tape recorded transcript of proceedings based on Plaintiffs' failure to attach an invoice, Plaintiffs argue that such information will be provided. Plaintiffs should have produced the subject invoice at the time of the filing of their original Motion for Attorney's Fees.

Plaintiffs argue about or against the fees awarded to Attorney Charles Brown and Attorney Rory Toomey. It is unclear whether Plaintiffs are arguing that the fees should be more or less than the amount awarded. In some instances, Plaintiffs argue that the amount should be increased; in other instances, Plaintiffs argue that the fees are excessive.[1] For example, Plaintiffs argue that the reduction of fees by 95 hours for work in the unsuccessful claim against Fort Jackson Federal Credit Union is incorrect. They cite to the Ninth Circuit decision in *Flowers v. First Hawaiian Bank*, 295 F.3d 975 (9th Cir. 2002) saying that the Ninth Circuit allowed the amendment. However, while the Ninth Circuit allowed the amendment of the Complaint, Plaintiffs still did not prevail on their claims against Fort Jackson Federal Credit Union. See Judgment entered by Judge Samuel P. King on December 8, 2003. Thus, because Plaintiffs are not a prevailing party with regards to Fort Jackson Federal Credit Union, Plaintiffs are not entitled to recover fees related to their claims against Fort Jackson Federal Credit Union.

Also, Plaintiffs have not established the need for reconsideration or to correct clear or manifest error in law or fact, to prevent manifest injustice. Plaintiffs allege that "the

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[1] Plaintiffs state that "[they] suspect the attorney [Charles Brown] fabricated billings and cooperated with defendant to excessively overcharge." Motion at page 11.

'good ole boy' system precludes Black Americans from competent legal representation" and because of this discrimination, he should be awarded attorney's fees for work done on the case as pro se plaintiffs to "act as a deterrent to discrimination."[2] See Motion at page 7. Plaintiffs' allegations is without merit.

Moreover, the Supreme Court has held that pro se litigants are not entitled to recover fees incurred by them for work done as pro se plaintiffs. *See Kay v. Ehrler*, 499 U.S. 432, 435 (1991).

Additionally, Plaintiffs argue that, "when the Court fails to award costs and reasonable attorneys fees in this case, it lets Defendants (sic) conduct replace the Right to Financial Privacy Act with the cynic's Golden Rule: 'He who has the gold rules.'" See Motion at page 14. This argument is also meritless.

Section 3417(a) of the Right to Financial Privacy Act, 12 U.S.C. § 3417(a), allows recovery of "reasonable attorney's fees as determined by the court." The Court, after carefully considering the file and the record presented, granted Plaintiffs' an award of $13,500.82 in reasonable attorneys' fees and taxable costs of $3,524.45. Plaintiffs have failed to show manifest error in law or fact to warrant reconsideration or correction of the court's prior ruling.

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[2] Plaintiff also argues that his right to equal protection has been violated. The court is unclear on how this argument relates to the present Motion.

Again, Plaintiffs' displeasure or disagreement with this Court's previous Order is an insufficient basis for reconsideration. *See Leong*, 689 F. Supp. at 1572.

## CONCLUSION

Based on the foregoing, the Court finds and concludes that Plaintiffs have failed to meet their burden as set out in *Great Hawaiian Fin. Corp v. Aiu*, 116 F.R.D. 612 (D. Haw. 1987) and L.R. 60.1. Therefore, the Court DENIES Plaintiffs Marshall K. Flowers and Anna Flowers (sic) Motion for Reconsideration of the US Magistrate Judge's Report of the Special Master on Plaintiffs' Motion for Attorney Fees and Non-Taxable Cost.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, APR 14 2004.

/s/_____
KEVIN S.C. CHANG
UNITED STATES MAGISTRATE JUDGE

## APPENDIX E

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed March 19, 2004]**

MARSHALL KENNETH FLOWERS, Plaintiff, v. UNITED STATES DEPARTMENT OF THE ARMY; and FIRST HAWAIIAN BANK, Defendants.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS, Plaintiffs, v. DEPARTMENT OF THE ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION, Defendants.

**REPORT OF THE SPECIAL MASTER ON PLAINTIFFS' MOTION FOR ATTORNEY FEES AND NON-TABLE (sic) COST**

On December 17, 2003, Plaintiffs Marshall K. Flowers and Anna Flowers (collectively, "Plaintiffs") filed a Motion for Attorney Fees and Non-Table (sic) Cost Pursuant to the Final Judgment Order Against First Hawaiian Bank in Civil Case 99-00335 SPK ("Motion"). Also on December 17, 2003, Plaintiff Anna Flowers filed a Substantive Joinder in the Motion. United States District Judge Samuel P. King referred the Motion to this Court pursuant to 28 U.S.C. § 636(b)(l)(B) and Rule 72.4, Local Rules of Practice for the United States District Court for the District of Hawaii ("LR") on December 18, 2003.

Defendant First Hawaiian Bank ("Defendant First Hawaiian") filed a Memorandum in Opposition on January 12, 2004. Plaintiffs filed their Response Memorandum on January 19, 2004. On January 27, 2004, Attorney Arthur E. Ross filed a Memorandum in Support of the Motion and filed a Supplemental Memorandum on February 6, 2004.

The Motion came on for hearing on January 31, 2004. Plaintiff Marshall Kenneth Flowers appeared pro se; Attorney Patsy Kirio appeared for Defendant First Hawaiian; Assistant United States Attorney Theodore Meeker appeared for Defendant United States Department of the Army.

After careful consideration of the Motion and supporting and opposing memoranda, the Court FINDS that Plaintiffs are entitled to reasonable attorneys' fees in the amount of $13,500.82 and costs in the amount of $3,524.45. Accordingly, the Court RECOMMENDS that Plaintiffs'

Motion for Attorney be GRANTED IN PART AND DENIED IN PART.

## BACKGROUND

Plaintiffs brought these two suits under the Right to Financial Privacy Act, 12 U.S.C. 01673401 et seq. ("RFPA"). The first suit was filed against the United States Army and Defendant First Hawaiian; the second action was against the United States Army and Defendant Fort Jackson Federal Credit Union. Both actions arose after Defendant First Hawaiian and Fort Jackson Federal Credit Union provided bank or financial records to the United States Army after receiving military subpoenas related to a Article 32 investigation.

Initially, Plaintiffs' suit against Defendant First Hawaiian was dismissed. The Ninth Circuit Court of Appeals reversed that decision and remanded the action to the District Court for further proceedings.

Following remand, Plaintiffs' actions were consolidated.

On December 5, 2003, Judge Samuel P. King issued an Order Granting in Part and Denying in Part Motions for Summary Judgment and Ruling on Other Pending Matters. In pertinent part, the Order entered judgment in favor of Plaintiffs and against Defendant First Hawaiian in the amount of two hundred dollars.

## DISCUSSION

Plaintiffs seek recovery of their attorney's fees and costs pursuant to the Right to Financial Privacy Act section 3417(a).

## I. Entitlement to Attorneys' Fees

Plaintiffs seek attorneys' fees pursuant to section 3417(a) of the Right Privacy Act which states, in pertinent part,

> Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to who such records relate . . .
> (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Defendant First Hawaiian argues that no fees should be allowed after March 31, 2003, when Defendant First Hawaiian admitted liability for purposes of trial. Defendant First Hawaiian argues any fees incurred after that date are not recoverable under section 3417(a) because Plaintiffs cannot be said to have been successful in enforcing liability.

Defendant First Hawaiian's argument is interesting. However, the argument is not compelling because the plain language of the statute does not specify a cut-off point in determining attorney's fees. The statute allows recovery of attorney's fees and costs in the case of "any successful action to enforce liability." Defendant First Hawaiian was found liable to Plaintiffs for the disclosure of financial information. Judgment was entered pursuant to Judge King's Order in favor of Plaintiffs and against Defendant First Hawaiian for two hundred dollars.

Therefore, the Court determines that under the Right to Financial Privacy Act section 3417(a), Plaintiffs are allowed reasonable attorney's fees and costs of the action.

**II. Calculation of Reasonable Attorneys' Fees**

In determining reasonable attorneys' fees, the district court must follow the "lodestar" approach adopted by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Supreme court instructs that the most useful starting point to determine a reasonable fee is "the number of hours reasonably expended multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Once calculated, the lodestar is presumptively reasonable. *See Pennsylvania v. Delaware Valley Citizen's Council*, 483 U.S. 711,728 (1987): *see also Cunningham v. County of Los Angeles*, 879 F.2d 481 (9th Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990).

In calculating the lodestar amount, the court should also take into account any of the relevant factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and adopted by the 9th Circuit in *Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). These factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions involved:
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client, and;
(12) awards in similar cases.

A reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). In determining a reasonable hourly rate, the district court must consider "'the experience, skill, and reputation of the attorney requesting fees.'" *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990)(quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (1985), *amended*, 808 F.2d 1373 (9th Cir. 1987)). The district court should be "guided by the rate prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation, it "is deemed to be reasonable." *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 (9th Cir. 1987). The party "opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and the reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1993)(citing *Blum*, 465 U.S. at 892 n.5).

Plaintiffs request payment of attorney's fees for the following: (1) the work done by them as pro se plaintiffs; (2) fees paid and allegedly owed to Charles Brown, Esq.; and (3) fees paid to Arthur Ross, Esq. The total amount sought by Plaintiffs is not stated in the Motion.

**A. Fees as Pro Se Litigants**

The Court, initially addresses the fees sought by Plaintiffs for work done on the case as pro se plaintiffs. Pursuant to Judge King's Order and applicable case law, Plaintiffs are not entitled to recover fees incurred for work done by them as prose plaintiffs. *See Kay v. Ehrler*, 499 U.S. 432, 435 (1991).

Therefore, the Court does not award any fees requested by Plaintiffs for their work as pro se plaintiffs.

**B. Fees of Charles R. Brown**

Plaintiffs also seek attorneys fees and costs for the work done by Attorney Charles R. Brown. Plaintiffs attach to the Motion billing statements from Attorney Brown. Again, Plaintiffs fail to state the exact amount sought. The Court, in its discretion, will calculate the total amount of the five billing invoices submitted by Plaintiffs and use that amount as the total fee requested.

| Billing Statement Date | Hours x Rate | Amount |
|---|---|---|
| March 12, 2003 | 64.00 x 125.00 | $ 8,000.00 |
| April 21, 2003 | 48.52 x 125.00 | $ 6,065.00 |
| June 25, 2003 | 139.37 x 125.00 | $17,421.25 |
| July 18, 2003 | 74.52 x 125.00 | $ 9,315.00 |
| September 23, 2003 | 79.44 x 125.00 | $ 9,930.00 |
| TOTAL | 405.85 hours | $50,731.25 |

Based on the foregoing, the Court deems $50,731.25 as being the total amount of Attorney Brown's fees requested by Plaintiffs.

First, the Court will reduce the hours expended for work done in CV 01-00412 SPK-KSC because Plaintiffs were not successful in establishing or enforcing liability against Fort Jackson Federal Credit Union. Therefore, the Court will initially reduce the requested total number of hours by ninety-five (95) hours.

**1. Hourly rates**

In determining a reasonable hourly rate, the district court must consider "the experience, skill, and reputation of the attorney requesting fees." *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1384 (9th Cir. 1990) (internal quotations and citations omitted). The Court finds that $125.00 per hour is a reasonable hourly rate charged by Attorney Brown.

**2. Hours reasonably expended**

Beyond establishing a reasonable hourly rate, a prevailing party seeking attorney's fees bears the burden of proving that the fees and costs taxed are associated with the relief requested and are reasonably necessary to achieve the results obtained. *See Tirona v. State Farm Mut. Auto Ins. Co.*, 821 F. Supp. 632 (D. Haw. 1993) (citations omitted). The court must also guard against awarding fees and costs which are excessive, and must assess the extent to which fees and costs are self-imposed and could have been avoided. *Id.* at 637 (citing *INVST Financial Group v. Chem-Nuclear Sys.*, 815 F.2d 391, 404 (6th Cir. 1987), *cert. denied*, 484 U.S. 927 (1988). Moreover, the party seeking the fee "bears the burden

of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." *Gates v. Deukmejian*, 977 F.2d 1300, 1305 (9th Cir. 1992).

First, the Court will delete the hours for the September 23, 2003 billing because there is no summary or adequate description of the billings attached for September 23, 2003. While the summary of billings attached for the other months requested may be incomplete, Plaintiffs submit absolutely no billing summary for the dates set forth in the September 23, 2003 billings. Therefore, the Court will not allow any recovery for amounts sought in the September 23, 2003 invoice and reduce the total hours expended by 79.44 hours.

Second, the Court reduces the hours expended for work done that the Court deems excessive or non-billable items. For example, the description entry for 3/13/03, states that work done was "Re: Meeting w/billing Age"; another example is the entry for 4/24/03 which states "Re: Case Management". These vague entries appear to be clerical or other work which is not recoverable as attorneys' fees for professional services rendered. An example of excessive billing can be found in the 4/19/03 entry, "Re: Subpeona (sic) for Depo.", counsel bills for 1.75 hours. The Court finds 1.75 hours for preparation of deposition subpoenas, without further explanation, is excessive. Based on the foregoing, the following hours are stricken:

| Invoice | Hours Reduced |
|---|---|
| March 13, 2003 | 15 hours |
| April 21, 2003 | 15 hours |
| June 25, 2003 | 20 hours |
| July 18, 2003 | 15 hours |

Therefore, after the reduction of the aforementioned hours, the total hours for invoices March, 2003, April, 2003, June, 2003, July, 2003 are 146.41 hours. Thus, the adjusted lodestar is as follows:

| | | |
|---|---|---|
| Total Hours requested | 405.85 | |
| (minus 95.00) | - 95.00 | |
| Subtotal | 310.85 | |
| (minus 79.44) | - 79.44 | |
| Subtotal | 231.41 | |
| (minus 65.00) | - 65.00 | |
| | | Hourly Rate |
| Total | 166.41 x | $125.00 |
| | = Adjusted Lodestar | |
| | $20,801.25 | |

In addition, the Court will reduce the adjusted lodestar amount for failure to detail the work performed. L. R. 54.3 sets forth the contents and requirements for Motion for Attorneys' Fees and related non-taxable expenses. Section (c) of L. R. 54.3, in pertinent part, states "[a] motion for attorneys' fees and related non-taxable expenses shall specify . . . the amount of attorneys' fees and related non-taxable expenses sought." This section goes on to say, "[i]n addition, the moving party shall file a memorandum in support and an affidavit of counsel." Plaintiffs have failed to meet the requirements of Section (c). In addition, Plaintiffs' Motion fails to adequately describe the services provided. Under L.R. 54.3 (d)(2), the court gives examples of information necessary for adequate descriptions of services rendered. The rule states, for example entries for research "must include an identification of the specific issue researched and, if possible, should identify the pleading or document for which the research was necessary." L.R. 54.3(d)(2) goes on further to say, "[i]f the time descriptions are incomplete, or if such

descriptions fail to describe adequately the services rendered, the court may reduce the award accordingly."

Mr. Brown's entries fail to sufficiently detail the services provided. For example, the entry for February 20, 2003 states "re: research". This entry fails to detail the specific issue researched or the document for which the research was conducted. Another example of inadequate description of services provided is the 4/24/03 entry, "Re: Pleadings Review". The entry fails to specify which pleadings were being reviewed and for what purpose. Therefore, the Court, in accordance with L.R. 54(d)(3)(2), reduces the adjusted lodestar by twenty percent (20%).

In addition, the Court reduces the adjusted lodestar by twenty-five percent (25%) for work conducted on claims that Plaintiffs were unsuccessful, i.e. punitive damages and tortious interference with prospective economic advantage.

This Court finds the following lodestar to be reasonable for Attorney Brown's fees:

| | HOURS | RATE | LODESTAR |
|---|---|---|---|
| | 166.41 | $125.00 | $20,801.25 |
| (minus 20%) | | | - 4,160.25 |
| Subtotal | | | $16,641.00 |
| (minus 25%) | | | - 4,160.25 |
| Subtotal | | | $12,480.75 |
| (4.167% tax) | | | + 520.07 |
| Attorney Brown's Total Lodestar | | | $13,000.82 |

**C. Fees of Arthur E. Ross**

Second, Attorney Arthur E. Ross seeks the recovery of fees incurred in defending Defendant First Hawaiian's motion to dismiss complaint. On January 27, 2004, Attorney Arthur E. Ross submitted a Memorandum in Support of Attorney Fees Incurred and Billed to Marshall Flowers in Defending Claim against Fort Jackson Federal Credit Union in November 1999. On February 6, 2004, Mr. Ross filed a Supplemental Memorandum in Support of Attorneys Fees Incurred in Defending Claim of Marshall K. Flowers Against First Hawaii Bank October 1999. Mr. Ross' declarations state that he retained Attorney Rory Toomey to assist him in preparing an opposition to Defendant First Hawaiian's motion to dismiss complaint and Defendant Fort Jackson's motion to dismiss. Mr. Ross' declaration stated that he agreed to pay Mr. Toomey the hourly rate of one hundred dollars. Mr. Toomey's declaration states that he spent twenty-three hours working on the opposition to Defendant Fort Jackson's motion to dismiss and five hours on the opposition to Defendant First Hawaiian's motion to dismiss.

The Court finds that one hundred dollars is a reasonable hourly rate for Mr. Toomey. The Court further finds that five (5) hours is reasonable amount of time expended for researching and drafting an opposition to a motion to dismiss. Thus, five hundred dollars is a reasonable lodestar. The Court disallows any amounts sought for work with regards to Defendant Fort Jackson because Plaintiffs are not the prevailing party with regards to Defendant Fort Jackson.

Therefore, based on the foregoing, this Court finds that Plaintiffs have established the appropriateness of an award of attorneys' fees as follows:

| | |
|---|---|
| Attorney Brown | $13,000.82 |
| Attorney Toomey | $ 500.00 |
| TOTAL LODESTAR | $13,500.82 |

**III.BILL OF COSTS**

Plaintiffs' Motion also requests costs incurred in this action.

Fed. R. Civ. P. 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d); *Trans Container Services (Basel) A.G. v. Security Forwarders, Inc.*, 752 F.2d 483, 488 (9th Cir. 1985). These costs are submitted to and taxed by the Clerk of the Court. *Id.* Any objections by the losing party must be "on motion served within 5 days thereafter." *Id.*

The Supreme Court has held that "28 U.S.C. § 1920 embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 482 (1987). Therefore, Petitioners are entitled to an award of those costs that are included within the definitions provided by 28 U.S.C. § 1920.

While courts do not have discretion to tax costs not included within the definitions provided by § 1920, courts do have discretion to interpret the meaning of phrases used in § 1920 in determining whether a requested cost falls within those definitions. *See Alflex Corp. v. Underwriters Labs, Inc.*, 914 F.2d 175, 177 (9th Cir. 1990). Costs defined in § 1920 include the following:

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of the title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. §1920.

Courts also have the discretion to deny costs. *See Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997). There is a strong presumption in favor of costs to the prevailing party, the unsuccessful litigant must point to some "impropriety on the part of the prevailing party that would justify denial of costs." *National Info. Servs., Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471-1472 (9th Cir. 1995). A court must specify reasons for its refusal to award costs. *See Assoc. of Mexican-American Educators v. Cal.*, 231 F.3d 572, 591 (9th Cir. 2000) citing *Subscription Televisions, Inc. v. Southern Cal. Theatre Owners Assoc.*, 576 P.2d 230, 234 (9th Cir. 1978).

For the purposes of awarding costs under Fed. R. Civ. P. 54(d), the prevailing party is generally one in whose favor judgment is rendered by the court. *See Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1997) (quoting *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977)). However, should each party be awarded partial judgment, the court has discretion to require each party to bear its own costs. *See id.*

(citing *Testa v. Village of Mundelein*, 89 F.3d 443 (7th Cir. 1996)).

On December 5, 2003, Judge Samuel P. King issued an Order Granting in Part and Denying in Part Motions for Summary Judgment and Ruling on Other Pending Matters. Judgment was entered in favor of Plaintiffs and against Defendant First Hawaiian in the amount of two hundred dollars.

In Plaintiffs' Motion, Plaintiffs seek as costs all the items listed in Exhibit D. Also, on January 29, 2004, Plaintiffs filed a Bill of Costs, Form AO 133, requesting a total of $4,594.04 in costs. Under L.R. 54.2, any request for costs are to be made "within thirty (30) days of the entry of judgment" and "noncompliance with this time limit shall be deemed a waiver of costs." Defendant First Hawaiian argues that the Form AO 133 filed January 29, 2004 is untimely and thus Plaintiffs have waived any recovery of cost. However, since Plaintiffs did request costs in their Motion for Attorneys' fees, the Court will treat the Form AO 133, Bill of Costs as an amended request for costs.

The Court finds that the costs requested in Exhibit D of the Motion are not recoverable under 28 U.S.C. § 1920. Therefore, Plaintiffs are not entitled to any costs sought in Exhibit D. As to the amounts requests in AO Form 133, Plaintiffs seek the following:

| | |
|---|---|
| Fees of the Clerk | $ 150.00 |
| Fees of the court reporter | $2,002.61 |
| Photocopies | $2,313.10 |
| Video Tape Duplication | $ 128.83 |
| | $4,594.54[1] |

The Court denies $20.00 for tape transcript and tape because Plaintiffs have failed to attach an invoice for this amount sought.

**A. Fees of the Court Reporter**

Plaintiffs seek $2,002.61 in court reporter fees.

Fees incurred obtaining deposition transcripts may be recovered under 28 U.S.C. §1920(2). *See Evanow v. M/V Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.* 976 F.2d 541, 551 (9th Cir. 1992). Such costs are recoverable only if necessarily obtained for use in the case. Denial of cost for deposition transcripts, solely because they were not used at trial, is within the district court's discretion. *See Washington State Dept. of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 806 (9th Cir. 1995). Conversely, the court may grant the cost of deposition transcripts not used at trial or in conjunction with summary judgment provided the transcripts were "necessarily obtained." *See Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1439 (9th Cir. 1993)(internal quotation omitted).

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[1] This total represents the correct amount of the costs requested. Plaintiffs' total of $4,594.04 was a miscalculation.

The Court denies video conference charges of $351.56 and $351.56, included in the requested fees of the court reporter, because these charges are not recoverable under 28 U.S.C. § 1920.

The Court will allow $1,299.49 in fees of the court reporter.

**B. Photocopies**

Plaintiffs request photocopying costs in the amount of $2,313.10.

28 U.S.C. § 1920(4) permits taxation for the copies of papers "necessarily obtained for use in the case" and does not require that the copied document be introduced into the record. *Haagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, 920 F.2d 587, 588 (9th Cir. 1990). The practice of this Court is to award $0.15 per page for copies necessarily obtained for use in the case.

The Court finds that some of the photocopying costs were probably used in the litigation with Defendant Fort Jackson, therefore, the Court reduces the amount requested for photocopying by fifteen (15%) percent. Thus, Plaintiffs may recover $1,966.13 in photocopy charges.

Based on the foregoing, Court allows taxation of costs in the following amounts:

| | |
|---|---|
| Fees of the Clerk | $ 150.00 |
| Fees of the court reporter | $1,299.49 |
| Photocopies | $1,966.13 |
| Video Tape Duplication | ~~$ 108.83~~ |

TOTAL COSTS AWARDED $3,524.45

## CONCLUSION

Based on the foregoing, the Court RECOMMENDS that the Motion be GRANTED IN PART AND DENIED IN PART and that Plaintiffs be awarded attorneys' fees in the amount of $13,500.82 and that the Clerk of the Court tax costs in the amount of $3,524.45.

IT IS SO FOUND AND RECOMMENDED.

Dated: Honolulu, Hawaii, MAR 19 2004

/s/ _____
KEVIN S.C. CHANG
UNITED STATES MAGISTRATE JUDGE

## APPENDIX F

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed March 1, 2004]**

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

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MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

## ORDER ADOPTING FINDINGS AND RECOMMENDATION REGARDING DEFENDANT FORT JACKSON FEDERAL CREDIT UNION'S BILL OF COSTS

The Court has reviewed the February 9, 2004, Findings and Recommendation ("F&R") of United States Magistrate Judge Kevin Chang to deny Plaintiffs' objections to Defendant Fort Jackson Federal Credit Union's ("Fort Jackson FCU") Bill of Costs, and to tax costs of $4,901.23 against Plaintiffs and for Fort Jackson FCU. The Court has also reviewed Plaintiffs' February 13, 2004, Motion for Review of Judge Chang's F&R and Fort Jackson FCU's Memorandum in Opposition.

After such review, the Court now ADOPTS the Findings and Recommendation to tax costs of $4,901.23 against Plaintiffs and for Fort Jackson FCU. The Court agrees with Judge Chang that Fort Jackson FCU was a prevailing party as to Plaintiffs' claims against Fort Jackson FCU. The Court also agrees that, under 28 U.S.C. § 1920, the requested costs were "actually and necessarily incurred" to defend the action.

The February 9, 2004 Report of the Special Master on Defendant Fort Jackson Federal Credit Union's Bill of Costs is ADOPTED.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, 1 March, 2004.

/s/ _____

SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

## APPENDIX G

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed February 9, 2004]**

MARSHALL KENNETH FLOWERS and ANNA FLOWERS, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE ARMY; and FIRST HAWAIIAN BANK, Defendants.

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MARSHALL KENNETH FLOWERS Plaintiffs,

v.

DEPARTMENT OF THE ARMY, 25th INFANTRY DIVISION (L) and FORT JACKSON FEDERAL CREDIT UNION, Defendants.

## REPORT OF THE SPECIAL MASTER ON DEFENDANT FORT JACKSON FEDERAL CREDIT UNION'S BILL OF COSTS

On January 7, 2004 Defendant Fort Jackson Federal Credit Union ("Defendant Fort Jackson") filed its Bill of Costs. An Amended Bill of Costs was filed on January 8, 2004.[1] Plaintiffs Marshall K. Flowers and Anna Flowers (collectively, "Plaintiffs") filed their opposition to the Bill of Costs on January 14, 2004. United States District Judge Samuel P. King referred the Bill of Costs to this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule ("LR") 72.4 on December 18, 2003. This Court finds this matter suitable without a hearing, pursuant to Local Rules of Practice for the United States District Court for the District of Hawaii ("LR") 7.2(d).

### BACKGROUND

Plaintiffs brought these two suits under the Right to Financial Privacy Act, 12 U.S.C. 01673401 et seq. ("RFPA"). The first filed case was against the United States Army and First Hawaiian Bank; the second action was against the United States Army and Fort Jackson Federal Credit Union. Both actions arose after First Hawaiian Bank and Defendant Fort Jackson provided bank or financial records to the United States Army after receiving military subpoenas related to an Article 32 investigation.

Initially, the suit against Defendant First Hawaiian was dismissed. The Ninth Circuit Court of Appeals reversed the

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[1] The Amended Bill of Costs did not change any amounts, but merely used the Court's form Bill of Costs.

decision and remanded the action to the District Court for further proceedings.

After the remand, both actions were consolidated.

On December 5, 2003, Judge King issued an Order Granting in Part and Denying in Part Motions for Summary Judgment and Ruling on Other Pending Matters. In pertinent part, this Order entered Judgment in favor of Defendant Fort Jackson and against Plaintiffs. A judgment was entered on December 8, 2003.

Thereafter, Defendant Fort Jackson filed its Bill of Costs.

**DISCUSSION**

In pertinent part, Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d); *Trans Container Services (Basel) A.G. v. Security Forwarders, Inc.*, 752 F.2d 483, 488 (9th Cir. 1985). These costs are submitted to and taxed by the Clerk of the Court. *Id.* Any objections by the losing party must be "on motion served within 5 days thereafter." *Id.*

The Supreme Court has held that "28 U.S.C. § 1920 embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party." *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 482 (1987). Therefore, petitioners are entitled to an award of those costs that are included within the definitions provided by 28 U.S.C. § 1920.

While courts do not have discretion to tax costs not included within the definitions provided by § 1920, courts do

have discretion to interpret the meaning of phrases used in § 1920 in determining whether a requested items of costs falls within those definitions. *See Alflex Corp, v. Underwriters Labs, Inc.*, 914 F.2d 175, 177 (9th Cir. 1990). Costs defined in § 1920 include the following:

1. Fees of the clerk and marshal;
2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and copies of papers necessarily obtained for use in the case;
5. Docket fees under section 1923 of the title;
6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

Courts also have the discretion to deny costs. *See Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997). There is a strong presumption in favor of costs to the prevailing party and the unsuccessful litigant must point to some "impropriety on the part of the prevailing party that would justify denial of costs."

*National Info. Servs., Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471-1472 (9th Cir. 1995). A court must specify reasons for its refusal to award costs. *See Assoc. of Mexican-American Educators v. Cal.*, 231 F.3d 572, 591 (9th Cir. 2000) citing *Subscription Televisions, Inc. v. Southern Cal. Theatre Owners Assoc.*, 576 P.2d 230, 234 (9th Cir. 1978).

Defendant Fort Jackson seeks the following in costs:

| | |
|---|---|
| Fees of the court reporter | $3,076.31 |
| Photocopies | $1,770.23 |
| Video Tape Duplication | $ 54.69 |
| | $4,901.23 |

Plaintiffs object to Defendant Fort Jackson's Bill of Costs as being untimely. Plaintiffs' objection is without merit.

The Court finds that Defendant Fort Jackson's Bill of Costs has been timely filed. Rule 54.2(b) of the Local Rules of Practice for the District of Hawaii, allows for the filing of a Bill of Cost within 30 days from the entry of judgment, unless otherwise ordered by the Court. Judgment was entered on December 8, 2003. Defendant Fort Jackson's Bill of Cost was timely filed on January 7, 2004.

Plaintiffs further argue in objection to the Bill of Costs that Defendant Fort Jackson is not a prevailing party. This objection is also without merit. It is clear that Defendant Fort Jackson is the prevailing party. For the purposes of awarding costs under Rule 54(d), the prevailing party is generally one in whose favor judgment is rendered by the court. *See Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1997) (quoting *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977)). Judge King's order specifically directs that Judgment should be entered against Plaintiffs in favor of Defendant Fort Jackson. Judgment was entered as such. Thus, Defendant Fort Jackson is the prevailing party in this action and is entitled to costs under Rule 54(d).

Plaintiffs, more specifically, objects to costs associated with the depositions of Plaintiffs, Velma Jones, Kenneth Credicos, Major John N. Ohlweiler and Major Randall

Bagwell. Defendant Fort Jackson seeks court reporter fees of $3,076.31 for deposition transcripts.

Fees incurred in obtaining deposition transcripts may be recoverable under 28 U.S.C. § 1920(2). *See Association of Flight Attendants v. Horizon Air Indus. Inc.*, 976 F.2d 541, 551 (9th Cir. 1992). Deposition costs are recoverable only if necessarily obtained for use in the case. *See Alflex*, 914 F.2d at 177-78. In this case, Defendant Fort Jackson used the above-referenced deposition transcripts in support of its Motions for Summary Judgment. The deposition transcripts were reasonably and necessarily obtained for use in this case. Accordingly, the court finds that the court reporter fees requested by Defendant Fort Jackson are permissible under 28 U.S.C. § 1920(2).

Defendant Fort Jackson seeks photocopy charges of $1,770.23.

28 U.S.C. § 1920(4) permits taxation for the copies of papers "necessarily obtained for use in the case" and does not require that the copied document be introduced into the record. *Haagen-Dazs Company, Inc. v. Rainbow Gourmet Ice Creams, Inc.*, 920 F.2d 587, 588 (9th Cir. 1990). The practice of this court is to award $.15 per page for copies made in-house[2] that were necessarily obtained for use in the case. This court generally awards copying costs as charged by commercial copiers and/or courts. Thus, the Court allows the costs sought for photocopying in the amount of $1,770.23.

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[2] Defendant Fort Jackson seeks in-house copying charges of $.10.

Having carefully reviewed Defendant Fort Jackson's Bill of Costs, Amended Bill of Costs, the attached exhibits, and counsel's affidavit verifying that the costs were actually and necessarily incurred in the action, the Court finds that Defendant Fort Jackson is entitled to recover all of its costs claimed.

## CONCLUSION

Based on the foregoing, the Court RECOMMENDS that Plaintiffs' objections to the Bill of Costs be DENIED and that costs be taxed against Plaintiffs Marshall Kenneth Flowers and Anna Flowers and for Defendant Fort Jackson in the amount of $4,901.23.

IT IS SO FOUND AND RECOMMENDED.

Dated: Honolulu, Hawaii, FEB 09 2004

/s/ _____
KEVIN S.C. CHANG
UNITED STATES MAGISTRATE JUDGE

## APPENDIX H

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed January 26, 2004]**

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

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MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

## ORDER DISMISSING CROSS-CLAIMS AND GRANTING MOTION TO EXTEND DEADLINE TO FILE NOTICE OF APPEAL

Plaintiffs have filed a Motion to Extend Deadline to File a Notice of Appeal Pursuant to Rule 58 of the Federal Rules of Civil Procedure. Under Local Rule 7.2(d), the Court finds the matter suitable for decision without an oral hearing. For the reasons set forth, the Court DISMISSES any remaining cross-claims and GRANTS Plaintiffs' motion to extend the time for appeal.

### DISCUSSION

Final Judgment in these consolidated cases was entered on December 8, 2003.[1] Because the United States is a party, the time to appeal -- absent a properly-filed tolling motion under Fed. R. App. P. 4(a)(4) -- expires 60 days from entry of judgment. *See* Fed. R. App. P. 4(a)(1)(B). Plaintiffs filed a

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[1] To the extent the pendency of cross-claims for contribution or indemnity would affect the finality of judgment, the Court DISMISSES the cross-claims. The cross-claim by Defendant Fort Jackson Federal Credit Union against the United States of America is DISMISSED without prejudice as MOOT because the Court has earlier dismissed Plaintiffs' claims against Fort Jackson FCU; if Fort Jackson FCU is not liable, then it need not seek contribution or indemnity.

Likewise, the cross-claim by Defendant First Hawaiian Bank against the United States is DISMISSED because, as set forth in the Court's earlier order, the United States is protected from liability for damages under the *Feres* doctrine. *See Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) (holding that third-party indemnity against the government is limited by the rationale of *Feres* where the injured party is a service person).

Fed. R. Civ. P. 60 motion for reconsideration (a tolling motion under Fed. R. App. P. 4(a)(4)(vi)) on December 15, 2003, which this Court denied on January 5, 2004. Without more, the time for appeal would presumably expire 60 days thereafter (on or about March 5, 2004).

Meanwhile, Plaintiffs filed a Motion for Attorneys Fees and Non-taxable Costs on December 22, 2003. Those proceedings are ongoing and could conceivably extend beyond March 5, 2004 (a hearing is presently set for January 30, 2004 before Judge Chang sitting as a special master). Ordinarily, attorneys fees matters are collateral to the merits of a case and any appeal to a circuit court from a final decision on attorneys fees would require a separate notice of appeal. *See* Fed. R. Civ. P. 58(c)(1); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).

However, Fed. R. App. P. 4(a)(4) provides in pertinent part:

> (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> . . . .
>
> (iii) for attorney's fees under Rule 54 <u>if the district court extends the time to appeal under Rule 58</u> (emphasis added).

In turn, Fed. R. Civ. P. 58 provides in pertinent part:

> (c) Cost or Fee Awards.

> (1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).
>
> (2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

By the instant motion, Plaintiffs apparently seek under Fed. R. App. P. 4(a)(4)(iii) and Fed. R. Civ. P. 58 to treat the motion for attorneys fees as a tolling motion for purposes of appeals from final judgment and rulings on attorneys fees. Commentary to the 1993 amendments to Rule 58 indicates that

> in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. [Fed. R. App. P. 4(a)(4)(iii)] permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4(a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

Given the lengthy proceedings in these cases, the Court concludes that it would be more efficient to resolve questions of attorneys fees before an appeal is taken so that any appeal

relating to any fee award (or lack thereof) can be heard at the same time as any appeals regarding the merits of these consolidated cases.

## CONCLUSION

Therefore, under Fed. R. Civ. P. 58(c)(2), Plaintiffs' motion for attorneys fees is to be treated in the same manner as a timely motion under Fed. R. Civ. P. 59. Plaintiffs seek an extension of 30 days in the time to appeal. Accordingly, the time for appeal shall be 30 days from the final district court decision on the Plaintiffs' motion for attorneys fees.

So as not to affect the finality of judgment, the Court also DISMISSES any remaining cross-claims between Defendants.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, January 26, 2004.

/s/ _____
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

## APPENDIX I

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed January 5, 2004]**

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

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MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

**ORDER AMENDING ORDER OF DECEMBER 5, 2003 AND DENYING MOTION FOR RECONSIDERATION**

The Court's Order of December 5, 2003 is amended as follows: On page 13, line 1, replace "will" with "with" so the sentence reads "Flowers presumably then retired with full military benefits."

The Court has reviewed Plaintiffs' Motion for Reconsideration of the December 5, 2003, Order and the oppositions of the Defendants. A motion for reconsideration must demonstrate either (a) discovery of new material facts not previously available; (b) intervening change in law; or (c) manifest error of law or fact. LR 60.1. Applied here, the new evidence cited was not material and does not change the Court's conclusions. There has been no intervening change in law nor any manifest error of law or fact. The motion for reconsideration is DENIED.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, January 5, 2004.

/s/ _____
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

## APPENDIX J

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**

**[Filed December 8, 2003]**

| | |
|---|---|
| MARSHALL KENNETH FLOWERS and ANNA FLOWERS, Plaintiff(s), | ) |
| v. | ) |
| FIRST HAWAIIAN BANK, Defendant(s). | ) |

**JUDGMENT IN A CIVIL CASE**

**Decision by Court**. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the, "Order Granting in Part And Denying In Part Motions For Summary Judgment And Ruling On Other Pending Matters", by the Honorable Senior U.S. District Judge Samuel P. King, filed December 5, 2003, Judgment is entered in favor of

Plaintiffs and against Defendant First Hawaiian Bank in the amount of two hundred dollars ($200.00).

December 8, 2003 — Date

WALTER A.Y.H. CHINN — Clerk

/s/ _____
(By) Deputy Clerk

## APPENDIX K

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 01-412SPK/BMK**

**[Filed December 8, 2003]**

| | |
|---|---|
| MARSHALL KENNETH FLOWERS and ANNA FLOWERS, Plaintiff(s), | ) |
| v. | ) |
| UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION, Defendant(s). | ) |

Decision by Court. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the, "Order Granting in Part And Denying in Part Motions for Summary Judgment and Ruling on Other Pending Matters", by the Honorable Senior U.S. District Judge Samuel P. King,

filed December 5, 2003, Judgment is entered against Plaintiffs and in favor of Defendant Fort Jackson FCU.

December 8, 2003 WALTER A.Y.H. CHINN
Date Clerk

/s/
(By) Deputy Clerk

## APPENDIX L

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed December 5, 2003]**

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

JUDGES: SAMUEL P. KING, UNITED STATES DISTRICT JUDGE.

**ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT AND RULING ON OTHER PENDING MATTERS**

**OVERVIEW**

In the latest set of motions in this case, the "Bank Defendants" (First Hawaiian Bank and Fort Jackson Federal Credit Union) have filed several motions for summary judgment on various aspects of the remaining claims. Plaintiffs Marshall and Anna Flowers have also filed a motion for summary judgment on liability under their claim under the Right to Financial Privacy Act, 12 U.S.C. § 3401, et seq. They have also filed a motion under Fed. R. Civ. P. 56(f) to postpone summary judgment proceedings for further discovery, which the Court will consider as part of the Plaintiffs' opposition to the various motions.

The motions at issue are: (1) Fort Jackson FCU's Motion for Partial Summary Judgment Re. RFPA Claims; (2) Fort Jackson FCU's Motion for Partial Summary Judgment Re. Punitive Damages (substantive joinder by First Hawaiian Bank); (3) Fort Jackson FCU's Motion for Partial Summary Judgment Re. Tortious Interference with Prospective Economic Advantage (substantive joinder by First Hawaiian Bank); (4) First Hawaiian Bank's Motion for Partial Summary Judgment On Claims for Attorneys' Fees; (5) First Hawaiian Bank's Motion for Summary Judgment as to all Claims for Compensatory Damages (substantive joinder by Fort Jackson FCU); and (6) Plaintiffs' Motion for Partial Summary Judgment.

For the reasons to follow, the Court GRANTS motions 1, 2, 3 and 5. The Court GRANTS in part and DENIES in part motions 4 and 6. The Court DENIES Plaintiffs' request for a continuance under Rule 56(f) because the issues involved are primarily questions of law on undisputed facts, because there has been ample time for discovery, and because there has been no showing that further discovery could lead to a different conclusion. Therefore, there being no triable issues of fact, judgment shall enter against Plaintiffs and in favor of Defendant Fort Jackson FCU. Judgment shall enter in favor of Plaintiffs and against Defendant First Hawaiian Bank in the amount of two hundred dollars ($200.00).

## BACKGROUND

The basic factual and procedural background of this case is set forth in this Court's order at *Flowers v. First Hawaiian Bank*, 85 F. Supp. 2d 993 (D. Haw. 2000), in the Ninth Circuit's opinion at *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002), and in this Court's recent decision in *Flowers v. First Hawaiian Bank*, 289 F. Supp. 2d 1213, 2003 U.S. Dist. LEXIS 20101, 2003 WL 22533140 (D. Haw. Oct 31, 2003). Plaintiff Marshall Flowers brought these suits primarily under the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. ("RFPA"), after Defendants First Hawaiian Bank and Fort Jackson Federal Credit Union provided bank records to the United States Army after receiving military subpoenas during Article 32 investigatory proceedings against then-Sergeant-Major Flowers. This Court dismissed the suit against First Hawaiian Bank, but the Ninth Circuit remanded to this Court after determining that an Article 32 subpoena was invalid and that litigation and grand jury exemptions under 12 U.S.C. §§ 3413(e) and 3413(i) did not apply. *See Flowers*, 295 F.3d at 970-77.

After remand, this Court consolidated the First Hawaiian Bank matter (Civ. No. 99-00335) with a similar matter involving Fort Jackson FCU (Civ. No. 01-412). Fort Jackson FCU consented to personal jurisdiction in Hawaii and the cases were consolidated upon Fort Jackson FCU's motion to consolidate. Subsequently, in recent orders, this Court dismissed constitutional claims and claims by Anna Flowers against Fort Jackson FCU. This Court also dismissed claims for damages against the United States based upon *Feres v. United States*, 340 U.S. 135, 146, 95 L. Ed. 152, 71 S. Ct. 153 (1950) and its progeny. *See Flowers*, 289 F. Supp. 2d at 1217, 2003 U.S. Dist. LEXIS 20101, 2003 WL 22533140, at *8. The instant order addresses remaining claims.

The Army's underlying Article 32 proceedings are collateral to the RFPA claims at issue in the case. The Court's role here is not to resolve or even to address the validity of the past larceny charges against Marshall Flowers. It has become apparent, however, that those charges and proceedings, although collateral, are nevertheless relevant to the primary remaining issues (causation and damages) in this suit. Plaintiffs and Defendants have provided much of the evidence or procedural history of those military proceedings as part of this RFPA case. Marshall Flowers spends much effort discussing those allegations and attempting to refute some of the evidence. He contends that the Bank Defendants' financial disclosures -- not the underlying military proceedings -- caused him damages, to wit, his leaving the Army two years short of his goal of 30 years of service. The Court therefore sets forth some of the relevant background of the charges and the underlying procedural history as necessary to explain why the financial disclosures, even if either Bank Defendant violated the terms of the RFPA, nevertheless are not responsible for Plaintiffs' alleged damages.

The evidence in the record provides, among other things, as follows:[1]

In December of 1997, SGM Marshall Flowers was apprehended for alleged shoplifting at the military Post Exchange at Schofield Barracks, Hawaii, after he was observed apparently shoplifting on a security video. [*See* Plank Decl.; Hollis Decl; Exhibits C, F, and L to Concise Statement of Facts in Support of Defendant First Hawaiian Bank's Motion for Summary Judgment as to all Claims for Compensatory Damages ("Motion 5 CSF")].

Prior to December of 1997, the Army had been investigating Flowers because he had returned duplicate items on multiple occasions to Army and Navy Exchanges, often without receipts, in exchange for cash. [Motion 5 CSF, Exh. F, G]. From December 1997 until March 1998, a military Criminal Investigation Division ("CID") investigated the conduct of both Marshall and Anna Flowers. [*Id.* Exh. K]. The evidence obtained by the CID appears to be substantial, although there apparently is or was some question about some of its admissibility in a subsequent criminal trial. [*Id.* at 16]. Among other evidence, a search of his residence found numerous duplicate and unopened electronic, computer, and other high-value items. Also found were multiple refund receipts and what is described as "homemade" refund receipts on his computer. [*Id.*, Exhs. K & O].

In April of 1998, the Army filed 42 charges of larceny against Flowers. [*Id.* Exh. M]. An Article 32 investigation

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[1] Although Plaintiffs attempt to dispute some of the details, the evidence is uncontradicted in any pertinent part. Any disputes of fact are not material to the issues now before the court.

was begun but proceedings were postponed at the request of defense counsel until June of 1998. [*Id.* Exh. N].

On June 19, 1998, a DD Form 453 subpoena was issued by the United States Army to First Hawaiian Bank requesting "all bank records, # 25478010, to include all deposits and withdrawals." This account belonged to Marshall and Anna Flowers. It stated that it was issued for an "Article 32 hearing" and cites Section 847 of the Uniform Code of Military Justice regarding punishment for failure to comply with the subpoena as well as a "Manual for Courts-Martial R.C.M. 703(e)(2)(G)." [*Id.* Exh. S].

First Hawaiian Bank notified Marshall Flowers of the subpoena by letter dated July 1, 1998, although it did not do so pursuant to the RFPA nor did it otherwise comply with the RFPA. [Moriki Decl.; Nakasone Decl; Motion 5 CSF, Exhibits F and JJ]. The notification appears to have been done as a matter of courtesy. First Hawaiian Bank did not actually produce documents to the Army until August 12, 1998. [Nakasone Decl.; Motion 5 CSF, Exhibits G and H].

On June 24, 1998, a DD Form 453 subpoena was issued by the United States Army to Fort Jackson FCU in South Carolina requesting "all bank account information since 1 Jan 97, to include # 582593." It also cited Section 847 of the Uniform Code of Military Justice regarding punishment for failure to comply with the subpoena as well as a "Manual for Courts-Martial R.C.M. 703(e)(2)(G)." [Exh. B to Concise Statement of Facts in Support of Fort Jackson FCU's Motion for Partial Summary Judgment Re. RFPA Claims ("Motion 1 CSF")]. The subpoena differed on its face from the subpoena issued to First Hawaiian Bank because it stated that the documents were for "a General court-martial of the United States ... appointed by MG James T. Hill to provide

evidence in the matter of United States v. SGM Marshall Flowers." [*Id.*] In contrast, the subpoena issued to First Hawaiian Bank was stated to be for "an Article 32 hearing," which is preliminary to a court-martial proceeding. [*Id.* Exh. C].

There appears to be no dispute that when the Fort Jackson FCU subpoena was issued there was not as yet any actual General Court-Martial proceeding ongoing (except perhaps to the extent an Article 32 could be considered as a necessary prerequisite to -- and therefore part of -- a court-martial). Perhaps the Army only intended to use the documents if the proceedings reached the court-martial stage, or perhaps the subpoena was wrong. The deposition testimony of Major Ohlweiler, the officer who signed both subpoenas, indicates the Fort Jackson FCU subpoena contained erroneous language. [*Id.* Exh. D ("The paralegal typed it out and I signed it, and he or she, and I don't remember who it was, wrote General Court-Martial rather than Article 32")]. In any event, there is no evidence that anyone from Fort Jackson FCU knew (or had reason to know) that the documents were, at that point anyway, for an Article 32 hearing rather than for a General Court-Martial. A cover letter from Ohlweiler to Fort Jackson FCU accompanying the subpoena stated that "SGM Flowers is currently facing a Court-Martial for 42 specifications of larceny." [Supplemental CSF in Support of Fort Jackson FCU's Reply Memorandum re: Punitive Damages and RFPA Claims, Exh. B]. Fort Jackson FCU complied with the subpoena by mailing credit union account statements to the Army on July 2, 1998. [*Id.* Exh. A].

An Article 32 hearing was conducted from June 25 to June 26, 1998. On July 16, 1998, the Army investigating officer issued a report reviewing the evidence and recommended that the charges against SGM Flowers be

adjudicated in a trial by General Court-Martial. [Motion 5 CSF, Exh. O]. The report does not mention financial records, and all evidence indicates that the financial records were not used (or even received by the Army) in that Article 32 proceeding. [*See, e.g., id.*, Exh. D (deposition testimony of General James Hill); Exh. F at 72-74, 92-93 (deposition testimony of Major Ohlweiler)].

Marshall Flowers was represented at the Article 32 hearing by military lawyers and civilian lawyer Charles Gittins. Mr. Gittens specializes in military defense cases and is known for handling "high profile" cases involving charges against, among others, the former Sergeant-Major of the Army and the Navy Commander in the U.S.S. Greenville submarine incident with the Japanese fishing vessel Ehime Maru. [*Id.*, Exh. F, at 81-82].

After the Article 32 hearing, Mr. Gittens contacted then-Capt. Ohlweiler or Capt. Bagwell, the Army's prosecutors for the proceeding, about "cutting a deal." Gittens told the Army that he was interested in "saving Sergeant Major Flowers' retirement, and that was his top priority, and ... wanted to propose that [the Army] would dismiss the charges and that Sergeant Major Flowers would accept punishment under Article 15, and would immediately submit his retirement." [*Id.*, at 82]. Gittins prepared a "Memorandum of Agreement for Alternative Disposition of Charges," under which the Army would withdraw the charges and Flowers would accept non-judicial punishment under Article 15 of the UCMJ and make an immediate request for retirement with leave to begin on September 1, 1998. [*Id.*, Exh. B]. Flowers signed the agreement on June 26, 1998; the Army signed it on August 4, 1998. [*Id.*]

At some point thereafter, Flowers chose instead to proceed with the court-martial. This was against the advice of his lawyers. Army defense counsel told Flowers, after consultation with other military lawyers and Mr. Gittins, that "disposition by Article 15 is a real victory for the defense" and that "Given the videotape evidence against you, it is very unlikely that you will be completely acquitted." [*Id.* Exh. P] Counsel advised "I can find no reason for you to demand trial by court-martial in this case. As your legal advisor, I genuinely believe demanding a trial by court-martial is irresponsible and totally unsound ... I urge you to reconsider and accept the article 15 offered to you in this case." [*Id.*] Although it is not exactly clear from the present record, it appears that Flowers accepted the advice. In any event, a second "Memorandum of Agreement for Alternative Disposition of Charges" was signed by Flowers and his lawyer, Charles Gittins, on August 22, 1998 and by the Army on August 28, 1998. [*Id.* Exh. Y].

An Article 15 hearing was then held on August 28, 1998. The proceedings allow an accused to present matters in defense of the charges or to mitigate punishment. Flowers and military defense counsel attended, but apparently did not present any defense or evidence. [Exh. C at 184, F at 98-100]. Flowers was found to have committed several acts in violation of Article 121 (larceny) of the UCMJ, and punishment was imposed in the form of forfeiting $1,788 per month for two months and receiving a formal letter of reprimand. [Exh. W]. The records released by First Hawaiian Bank and Fort Jackson FCU that are the subject of this action were not presented in the Article 15 proceeding. [Exh. F at 98-100].

Flowers appealed the Article 15 punishment. [Exh. Y]. (As part of the appeal, Flowers treats the financial

information as exculpatory as he argued: "Documents were subpoenaed referencing my bank account. The withholding of these documents at the Article 32 investigation prejudiced the outcome of this case.") [Exh. Y, at 3]. The appeal was denied by General Hill. [Exh. D at 51, 60].

Marshall Flowers did not immediately submit retirement papers as set forth in the Memorandum of Agreement. According to an affidavit of Marshall Flowers, the Article 15 punishment was "withdrawn" and, on November 13, 1998, the charges were re-preferred. [Affidavit of Marshall K. Flowers "in Opposition to Defendant First Hawaiian Bank [sic] Motion for Summary [sic] Re. All Claims," at 5-6]. A second Article 32 hearing was eventually held on March 18 and 19, 1999. The result of the second hearing appears to have been favorable to Flowers. [*Id.* at 6]. The recommendation apparently was for "administrative separation" or "administrative disposition" although General Hill and military prosecutors had apparently decided to proceed with a General Court-Martial anyway. [Motion 5 CSF, Exh. D at 68].

At this point, Flowers' term of service expired on May 13, 1999. As an enlisted soldier, to remain in the service, he needed to reenlist. On April 27, 1999, Flowers' immediate supervisor imposed a formal "bar to re-enlistment," effectively ending his military career at 28 years. [Motion 5 CSF, at Exh. D, Exh. Z]. The bar to re-enlistment cited the previous non-judicial punishment (the Article 15 proceedings and findings of violations of Article 121). The commanding officer indicated that he "only recently learned that a bar had not been imposed previously, as would have been appropriate." [*Id.* Exh. Z]. General Hill approved the bar and testified that such a bar should have been imposed long before

as a matter of course once charges were preferred. [*Id.* Exh. D at 73].

On May 27, 1999, military counsel on behalf of Flowers appealed the bar to re-enlistment through Army channels. [*Id.* Exh. AA]. The appeal was denied on June 21, 1999. [*Id.* Exh. BB]. General Hill then directed that Flowers had 14 days to submit his retirement. [*Id.* Exh. CC]. Flowers presumably then retired will full military benefits. He has claimed on several occasions that he was forced to retire with 28 years of service when his goal was 30 years.

## ANALYSIS

### 1. Fort Jackson FCU's Motion for Partial Summary Judgment Re. RFPA Claims.

Fort Jackson FCU moves for partial summary judgment on claims brought under the RFPA, contending that the subpoena issued to Fort Jackson FCU falls within a "litigation exception" to the RFPA under 12 U.S.C. § 3413(e). Section 3413(e) provides:

> Disclosure pursuant to Federal Rules of Criminal Procedure of comparable rules of other courts.
>
> Nothing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.

This exception was litigated in the prior proceedings. The Court applied it to bar the RFPA claim against First Hawaiian

Bank but the Ninth Circuit held that an Article 32 subpoena, although it fulfilled all other elements of the exception, was not issued "under ... comparable rules of other courts" because the UCMJ does not authorize subpoenas in Article 32 proceedings to civilian parties. *Flowers*, 295 F.3d at 972-73. To protect itself, the Ninth Circuit reasoned, First Hawaiian Bank could have obtained a certificate of compliance from the Army pursuant to the RFPA. *Id.* at 975.

Fort Jackson FCU, however, points out that the subpoena issued to it by the Army -- unlike the subpoena issued to First Hawaiian Bank -- was a General Court Martial subpoena. Indeed, the Ninth Circuit indicated that this might make a difference because the UCMJ does specifically authorize subpoenas in court-martials. *See id.* at 972 ("Our conclusion might be otherwise if the subpoena were issued in connection with a pending court-martial proceeding ... The UCMJ, however, specifically authorizes the issuance of a subpoena in court-martial proceedings. No such authority exists for the issuance of a supoena in an Article 32 proceeding.").

Fort Jackson FCU argues that this distinguishes the Ninth Circuit *Flowers* opinion. Even after *Flowers*, a General Court-Martial subpoena still falls within the "litigation exception" to the RFPA. The only complication is that apparently this was NOT yet a General Court-Martial; the Fort Jackson FCU subpoena appears to have been wrong. Facially, however, the subpoena was one that fits within an exception. There was no way Fort Jackson FCU would have, or even should have, known that the underlying proceeding had not yet reached courtmartial stage. As stated earlier, the Army in the subpoena's cover letter reiterated that the information was needed for a General Court Martial. Even if the Army incorrectly listed the subpoena, perhaps prematurely, as being for a General Court Martial, this is not

Fort Jackson FCU's fault. *See Roberts v. Sabine State Bank & Trust Co.*, 226 F.3d 374, 376 (5th Cir. 2000) (applying section 3413(e) and finding bank not liable under the RFPA for disclosures made during a General Court Martial even if the Army violated its own regulations).

Despite the Plaintiffs' arguments to the contrary, there is absolutely no evidence that the Fort Jackson FCU subpoena was "manufactured" or otherwise fraudulently created after the Ninth Circuit's opinion in *Flowers* so as to fit within the language of the opinion. All the evidence indicates that the subpoena in the record is the subpoena issued on June 24, 1998 that led to the financial disclosures at issue in this action. Because the subpoena facially met the requirements under section 3413(e) and because there is absolutely no indication that Fort Jackson FCU had reason to know that the subpoena might have been improper, the Court GRANTS Fort Jackson FCU's motion for partial summary judgment. The subpoena fits squarely within the "litigation exception" to the RFPA under 12 U.S.C. § 3413(e).

**2. Fort Jackson FCU's Motion for Partial Summary Judgment Re. Punitive Damages (Substantive Joinder by First Hawaiian Bank).**

Both Bank Defendants ask the Court to dismiss the punitive damage claims under 12 U.S.C. § 3417(a)(3) because there is no evidence of "willfulness." The Court agrees.

Section 3417(a) provides:

(a) Liability of agencies or departments of United States or financial institutions

> Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to whom such records relate in an amount equal to the sum of–
>
> (1) $100 without regard to the volume of records involved;
>
> (2) any actual damages sustained by the customer as a result of the disclosure;
>
> (3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional [emphasis added]; and
>
> (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

"Willfulness" for purposes of punitive damages under the RFPA requires actions that are "more than gross negligence" and "so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful." *Taylor v. Dep't of the Air Force*, 18 F. Supp. 2d 1184, 1192 (D. Colo. 1998) (citing *Andrews v. Veterans Admin.*, 838 F.2d 418, 425 (10th Cir. 1988)).

On the present record, there is no evidence coming close to this standard. Every indication was, prior to the Ninth Circuit's opinion, that it was proper for financial institutions to comply with military subpoenas without fear of violating the RFPA. *See, e.g., Russell v. Department of the Air Force*, 915 F. Supp. 1108 (D. Colo. 1996) (addressing use under

RFPA of financial records obtained during Article 32 proceedings and appearing to treat such subpoenas as proper). Even this Court agreed with the interpretation that an Article 32 subpoena fell within the exception. Although the Ninth Circuit has clarified the law in this area, the Bank Defendants cannot be held to have "willfully" violated the RFPA by relying on facially valid military subpoenas. Indeed, First Hawaiian Bank did not release any information until after it sent notification to the Plaintiffs by letter. With either the "Article 32 subpoena" or the General Court Martial Subpoena at issue here, there was no indication that the subpoenas were improper.

Moreover, if the section 3413(e) exception applied, there was no reason to obtain a certificate of compliance under 12 U.S.C. § 3411 because "nothing in [the RFPA] shall apply where records are sought" in litigation between the Government and the customer under section 3413(e). That is, the certificate of compliance sections of the RFPA did not apply. The Bank Defendants were faced with subpoenas directing that failure to comply is a crime against the United States and is punishable by a fine of not more than $500 or imprisonment for six months. Good faith compliance with the subpoenas by the Bank Defendants was certainly prudent and not reason to impose punitive damages.

The only question is whether to allow the Plaintiffs more time for discovery under Rule 56(f) to seek evidence of willfulness. But there has been no showing of any possibility of such evidence. The relevant discovery has occurred. Plaintiffs have obtained depositions or documents, or had an opportunity to discover such evidence, from all the First Hawaiian Bank and Fort Jackson FCU employees who had contact or responsibility with compliance with the particular subpoenas at issue. Further discovery in this regard from the

Army witnesses would not be relevant to the state of mind of the Bank Defendants. At best, Plaintiffs have some hope that evidence of egregiousness will develop and this is not enough. *See Continental Maritime of San Francisco, Inc. v. Pac. Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1395 (9th Cir. 1987) ("The mere hope that further evidence may develop ... is an insufficient basis for a continuance under Fed. R. Civ. P. 56(f)"); *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991) (reasoning that the party opposing summary judgment bears burden of showing that evidence sought actually exists and that a denial of a Rule 56(f) application is proper where the evidence sought is almost certainly nonexistent and the object of pure speculation). The Rule 56(f) request is DENIED.

**3. Fort Jackson FCU's Motion for Partial Summary Judgment Re. Tortious Interference with Prospective Economic Advantage (Substantive Joinder by First Hawaiian Bank).**

The Bank Defendants ask the Court to dismiss the TIPEA claim. According to the operative complaint's allegations, this claim was directed only at the federal defendants (who were dismissed a few weeks ago under *Feres*). This is true, and the cause of action fails on this basis alone. Even if not, this tort claim appears to be barred by the RFPA's exclusivity of remedies provision. *See* 12 U.S.C. § 3417(d) ("The remedies and sanctions described in this chapter shall be the only authorized judicial remedies and sanctions for violations of this chapter").[2]

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[2] This provision also bars any remaining state tort claim for intentional or negligent infliction of emotional distress.

In any event, the TIPEA claim fails. The theory would be that Defendants tortiously interfered with Flowers' last two years of military service (i.e., the additional two years that he says he could have obtained if he retired at 30 years rather than 28 years of service). But nothing the Defendants did in releasing financial records, even assuming a wrongful release, caused Flowers to have to retire early. The early retirement was caused by the larceny charges or other actions of the Army (e.g., the bar to re-enlistment). Flowers has even argued that there was nothing wrong with his financial records and nothing in them to support the larceny charges. That is, he essentially argues that the financial records were helpful to defending himself against the Army's charges. The TIPEA claims fail for lack of causation.

**4. First Hawaiian Bank's Motion for Partial Summary Judgment On Claims for Attorneys' Fees.**

First Hawaiian Bank seeks a ruling that Plaintiff is not entitled to attorneys' fees as part of his damages. This is a valid argument. Because Flowers is pro se, U.S. Supreme Court case law indicates that he cannot recover attorneys' fees as a prevailing party under 12 U.S.C. § 3417 (a)(4). *See Kay v. Ehrler,* 499 U.S. 432, 435, 113 L. Ed. 2d 486, 111 S. Ct. 1435 (1991) (reasoning that "a pro se litigant who is not a lawyer is not entitled to attorney's fees" in civil rights cases and finding that fees are not appropriate even if the litigant is an attorney).

First Hawaiian Bank also seeks a ruling that even the attorneys fees (if any) incurred when Plaintiffs had an attorney should be limited to the period before March 31, 2003, when First Hawaiian offered to admit to a violation of the RFPA. (First Hawaiian and the Army have filed a stipulation that there was a violation of the RFPA; It was

signed by Judge Chang as a judicial admission.) Any fees for after March 31, 2003 would be unreasonable because fees could not have been incurred to prove liability for an RFPA violation.

This argument is premature. There is no indication that an attorney (such as the prior attorney Charles Brown) has actually sought such fees. Although the argument may have merit, whether attorneys may seek fees under section 3417(a)(4) for any success achieved in this action is not ripe. If such an application is made by an attorney, it can be addressed on a full record.

Therefore, the motion is GRANTED insofar as the Court declares it will follow existing precedent in deciding that pro se litigants are not entitled to attorneys fees as prevailing parties. The motion is DENIED without prejudice as to the remaining relief sought regarding other attorneys fees.

5. First Hawaiian Bank's Motion for Summary Judgment as to all Claims for Compensatory Damages (Substantive joinder by Fort Jackson FCU).

The Bank Defendants seek summary judgment on the Flowers' claims for damages (other than the statutory damages of $100 against First Hawaiian Bank). The substantive joinder by Fort Jackson FCU is now moot because the Court has already found that Fort Jackson FCU has no RFPA liability.

First Hawaiian Bank contends that there is no evidence that either Plaintiff (i.e., either Anna or Marshall Flowers) suffered any actual damages. Plaintiffs can point to no evidence of consequential damages from an unauthorized financial disclosure (such as, for example, identity theft or

other tangible adverse financial or tax problems caused by the disclosures). This argument is valid.

Marshall Flowers cannot prove that his allegedly forced retirement had anything to do with the disclosures. The records disclosed appear to be nothing more than bank statements. True, bank statements contain personal information. However, the undisputed evidence is that the Army did not even have the records at the time of the first Article 32 hearing. The information in the records had nothing to do with the decision to prosecute Flowers, to pursue an Article 32, to cause the Army to impose a bar to re-enlistment, or otherwise to cause Flowers to retire early. The Army's determination to begin Article 32 proceedings against Marshall Flowers *preceded* the release of financial records. The Army's recommendation to proceed with a General Court-Martial had nothing to do with the release of records. [*See* CSF 5, Exh. F at 72-74, 92-93; Exh. D, at 97.] Any subsequent discipline the Army imposed had nothing to do with the release of financial records. [*See*, *Id.* Exh. F at 98-100, Exh. D at 79, 86]. There simply is no evidence that any alleged damages could have been caused by First Hawaiian Bank's (or, for that matter, Fort Jackson FCU's) release of financial information. (If anything, the financial information helped him or could have helped him if it is true that there was nothing incriminating in the records as Flowers has argued.)

Similarly, even if the Court accepts for purposes of this motion that Anna or Marshall Flowers suffered emotional distress over the events described here, the undisputed evidence is that any emotional distress type damages would be caused by the prosecution of his claims -- i.e., by the Army's decision to investigate and prosecute violations of the UCMJ or to impose a bar to re-enlistment -- not by First Hawaiian

Bank's release of financial records. Litigation stress is not recoverable as damages. *E.g.*, *Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir. 1983); *Picogna v. Bd. of Ed.*, 143 N.J. 391, 671 A.2d 1035, 1038 (N.Y. 1996) ("the majority of courts addressing litigation-induced stress have treated it as a non-compensable component of damages").

For similar reasons as discussed above, there is no reason to postpone proceedings under Fed. R. Civ. P. 56(f) for further discovery into causation. The Court can conceive of no evidence that would create a genuine issue of fact that the financial disclosures by First Hawaiian Bank would have caused the Army to impose a bar to re-enlistment for SGM Flowers, and there is nothing in the present record to indicate as such. There is every indication that the Army's decision to end SGM Flowers' career was independent of the technical RFPA violations. There being no genuine issue of material fact, the Court GRANTS First Hawaiian Bank's Motion for Summary Judgment, insofar as it seeks a finding that Plaintiffs are not entitled to any damages under the RFPA in excess of the statutory damages.

**6. Plaintiffs' Motion for Partial Summary Judgment.**

Plaintiffs have also filed a summary judgment motion seeking a determination that the Defendants are liable under the RFPA. This motion has merit as to First Hawaiian Bank but not as to Fort Jackson FCU as the Court has already determined that Fort Jackson FCU is protected by the litigation exception in 12 U.S.C. § 3413(e).

After the Ninth Circuit's opinion, First Hawaiian Bank filed a stipulation on April 9, 2003 (which the Court has treated as a judicial admission) that it committed a violation of the RFPA. Indeed, First Hawaiian Bank's violation was

mandated by the Ninth Circuit in its *Flowers* opinion. First Hawaiian Bank, however, objects to any entry of judgment in excess of $200, which would represent $100 in favor of each Plaintiff.

The Court therefore GRANTS Plaintiff's motion for partial summary judgment to the extent it asks the Court for a finding of liability on an issue that First Hawaiian Bank has already admitted. There is no issue of fact that First Hawaiian Bank is liable by statute towards Plaintiffs under 12 U.S.C. § 3417(a)(1).[3] The Court therefore GRANTS summary judgment in favor of Plaintiffs and awards damages in the amount of $200 ($100 to each Plaintiff).[4]

## CONCLUSION

For the foregoing reasons, judgment shall enter against Plaintiffs and in favor of Defendant Fort Jackson FCU.

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[3] Again, Section 3417(a) provides in pertinent part:

(a) Liability of ... financial institutions

> Any ... financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to whom such records relate in an amount equal to the sum of--
>
> (1) $100 without regard to the volume of records involved[.]

[4] Although the Court finds that Fort Jackson FCU is protected by section 3417(a), if this finding was incorrect, Plaintiff Marshall Flowers would be entitled to $100 from Fort Jackson FCU. As set forth in an earlier order, Anna Flowers was not an account holder with Fort Jackson FCU.

Judgment shall enter in favor of Plaintiffs and against Defendant First Hawaiian Bank in the amount of two hundred dollars ($200.00).

All other pending matters are DENIED or are MOOT. Because final judgment will enter, Plaintiffs' motion to file an interlocutory appeal (and corresponding ex parte motion to shorten time) is not necessary. Plaintiffs' November 22, 2003, appeal from a September 19, 2003 order of United States Magistrate Judge Chang regarding filing a third amended complaint and to enlarge the time for filing dispositive motions is DENIED. The September 19, 2003 order was neither clearly erroneous nor contrary to law.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, December 5, 2003.

/s/
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

## APPENDIX M

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF HAWAII**

**CIV. NO. 99-00335SPK/KSC**
**CIV. NO. 01-412SPK/BMK**

**[Filed October 31, 2003]**

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

FIRST HAWAIIAN BANK,
Defendant.

MARSHALL KENNETH FLOWERS and ANNA FLOWERS,
Plaintiffs,

v.

UNITED STATES ARMY, 25th INFANTRY DIVISION (L); and FORT JACKSON FEDERAL CREDIT UNION,
Defendants.

JUDGES: SAMUEL P. KING, UNITED STATES DISTRICT JUDGE.

**ORDER GRANTING FEDERAL DEFENDANTS' MOTIONS TO DISMISS, AND AFFIRMING IN PART AND REVERSING IN PART THE SEPTEMBER 11, 2003 DISCOVERY ORDER**

The federal defendants -- the United States Army and, to the extent they remain in any capacity as named defendants, former Captain (now Major) John Ohlweiler, and Secretary of the Army Thomas White (hereinafter "the government") -- move to dismiss the Second Amended Complaint.

Also at issue are two appeals (one from the government and one from Plaintiffs) under LR 74.1 from the same order of U.S. Magistrate Judge Chang.[1] The appeals essentially become moot as to the government witnesses if the case against the government is dismissed.

The matter was heard on October 31, 2003. For the reasons set forth, the government's motions to dismiss are GRANTED. As to the government's discovery appeal, although the matter appears to be moot, Judge Chang's order

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[1] On September 11, 2003, Judge Chang issued an order allowing Marshall Flowers to reconvene depositions of five persons, including Major Ohlweiler and General Hill, upon certain conditions. The witnesses were deposed earlier, but Marshall Flowers apparently instructed his then-attorney not to attend. Now that he is again proceeding pro se, Marshall Flowers wants to proceed with the depositions. The government objects primarily to allowing another deposition of a four-star General; Flowers objects to the conditions imposed, which include a time limit and allowance of depositions by video or telephone.

is REVERSED to the extent it allows re-deposition of the three Army witnesses. Otherwise, the discovery order is AFFIRMED.

## I.

The basic factual background of this case is set forth in this Court's order at *Flowers v. First Hawaiian Bank*, 85 F. Supp. 2d 993 (D. Haw. 2000) and in the Ninth Circuit's opinion at *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002). Plaintiff Marshall Flowers brought these suits primarily under the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. ("RFPA"), after Defendants First Hawaiian Bank and Fort Jackson Federal Credit Union provided bank records to the United States Army after receiving a military subpoena during Article 32 investigatory proceedings against then-Sergeant Major Flowers. This Court dismissed the suit against First Hawaiian Bank, but the Ninth Circuit remanded after determining that the Article 32 subpoenas were invalid and that litigation and grand jury exemptions did not apply. *See Flowers*, 295 F.3d at 970-77. After remand, this Court consolidated the First Hawaiian Bank matter (Civ. No. 99-00335) with a similar matter involving Fort Jackson Federal Credit Union (Civ. No. 01-412).[2]

The government first contends that the Plaintiffs' claims for damages against the government are barred by the *Feres* doctrine. *See, e.g., Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997) ("The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries

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[2] Fort Jackson FCU consented to personal jurisdiction in Hawaii and the cases were consolidated upon Fort Jackson's motion to consolidate.

*arise out of or are in the course of activity incident to service.*") (quoting *Feres v. United States*, 340 U.S. 135, 146, 95 L. Ed. 152, 71 S. Ct. 153 (1950) (emphasis in original)). After due consideration, the Court concludes that *Feres* requires this Court to dismiss the Plaintiffs' claims against the government.[3]

**1. "Incident to Service."**

Marshall Flowers cannot dispute that his (and his wife's) claims "arise out of or are in the course of activity incident to service." *Id.* Assuming the truth of the operative complaint's allegations and considering the undisputed evidence in the record, Marshall Flowers was an active duty Sergeant Major in the Army when the financial disclosures took place. That is, he was on active duty when the alleged violations of the RFPA occurred. The relevant disclosures of bank records occurred in the course of, and because of, a military Article 32 proceeding against him investigating charges against him of 42 counts of larceny at military exchanges.

Marshall Flowers retired or resigned from the Army in lieu of facing a general court martial. He filed this civil action after leaving the Army. However, even though he is no longer in the military, *Feres* still applies to the claims that arose while he was on active duty. *See*, e.g., *Jackson v. Brigle*, 17 F.3d 280, 281 (9th Cir. 1994) (barring action brought by former Air Force officer).

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[3] At present, RFPA claims against First Hawaiian and Fort Jackson remain.

**2. Right to Financial Privacy Act.**

The closer question is whether the *Feres* doctrine should be extended from the Federal Tort Claims Act to bar Marshall's (and his wife's) claims for damages under the RFPA. This appears to be an issue of first impression.

Originally, *Feres* barred negligence claims by military personnel against the government under the FTCA, even though the FTCA is not, by its terms, limited only to civilians. 340 U.S. at 146. Although the doctrine has been criticized, *see, e.g., United States v. Johnson*, 481 U.S. 681, 703, 95 L. Ed. 2d 648, 107 S. Ct. 2063 (Scalia, J., dissenting), the doctrine's logic and rationale have been extended from the FTCA to many other contexts. "Practically any suit that 'implicates the military judgment and decisions' runs the risk of colliding with *Feres*." *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991) (quoting *United States v. Johnson*, 481 U.S. 681, 691, 95 L. Ed. 2d 648, 107 S. Ct. 2063 (1987)). *Feres* is a doctine of "intramilitary immunity." *Hodge*, 107 F.3d 705, 710 (9th Cir. 1997).

The *Feres* doctrine now bars not only claims of negligence, but also intentional torts as well. *See, e.g., Mollnow v. Carlton*, 716 F.2d 627, 628 (9th Cir. 1983).

It bars claims not only against the government, but also claims against individuals. *See Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1480-81 (9th Cir. 1991) (recognizing intramilitary immunity for suits between military members based on injuries sustained incident to service).

It bars claims not only against military supervisors, but also against all claims for damages that were "incident to service." *United States v. Stanley*, 483 U.S. 669, 680-81, 97

L. Ed. 2d 550, 107 S. Ct. 3054 (1987). This includes claims against military doctors for medical malpractice. *See, e.g., Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987).

It bars civil rights claims against federal individuals brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). *See Chappell v. Wallace*, 462 U.S. 296, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983).

Likewise, it bars 42 U.S.C. § 1983 civil rights claims by national guard personnel against state officers. *See Bowen v. Oistead*, 125 F.3d 800, 803 n.2 (9th Cir. 1997)

It bars Title VII-type discrimination in employment claims under 42 U.S.C. § 2000e-16. *See Hodge*, 107 F.3d at 710 (reasoning that the *Feres* doctrine, as well as the language of section 2000e-16 regarding prohibited employment discrimination against employees of "military departments," bars statutory claims by members of the armed forces).

It bars claims by military members for civil rights conspiracy claims under 42 U.S.C. § 1985(1). *See Mollnow*, 716 F.2d at 631. And it bars similar civil rights claims under 42 U.S.C. § 1985(3). *See Trerice v. Pedersen*, 769 F.2d 1398, 1402 (9th Cir. 1985); *Bois v. Marsh*, 801 F.2d 462, 469, 255 U.S. App. D.C. 248 (D.C. Cir. 1986).

It bars suits under the Public Vessels Act, 46 U.S.C. §§ 781-790. *See Charland v. United States*, 615 F.2d 508, 509 (9th Cir. 1980).

Further, an intramilitary immunity rationale applies to bar claims by military members under the Americans with Disabilities Act, Age Discrimination in Employment Act, and

the Rehabilitation Act. *See Baldwin v. United States Army*, 223 F.3d 100 (2d Cir. 2000) (barring ADA claims); *Spain v. Ball*, 928 F.2d 61 (2d Cir. 1991) (ADEA); *Coffman v. Michigan*, 120 F.3d 57 (6th Cir. 1997) (Rehabilitation Act).

Given the range of case law, the Court concludes that*Feres* bars the Flowers' claims for damages here under the RFPA.

Case law provides three justifications for the *Feres* bar. *See Johnson*, 481 U.S. at 688-89. First, "the relationship between the Government and members of its armed forces is distinctively federal in character." *Id.* (citations and internal quotations omitted). "Where a service member is injured incident to service -- that is, because of his military relationship -- it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to the serviceman." *Id.* (citations and internal quotations omitted). In other words, Congress could not have intended with the FTCA to subject the armed forces to vagaries of local tort law.

Second, the existence of "generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Id.* That is, benefits under the Veterans' Benefits Act essentially preclude additional remedies under the FTCA.

Third, suits by service members against the government for injuries incurred incident to service "if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States v. Shearer*, 473 U.S. 52, 59, 87 L. Ed. 2d 38, 105 S. Ct. 3039 (1985). This third rationale -- involvement in military discipline -- is most important for the question

involved here. It makes the *Feres* doctrine applicable "whenever a legal action would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces." *Zaputil v. Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) (citations and internal quotations omitted). "The test has been broadly construed to immunize the United States and member of the military from any suit which may intrude in military affairs, second-guess military decisions, or impair military discipline." *Id.* (citations and internal editorial marks omitted).

Marshall Flowers' entire RFPA claim is based upon a subpoena or subpoenas issued to two financial institutions during an Article 32 proceeding investigating charges against him of 42 counts of larceny. Although, after the Ninth Circuit's decision remanding this case -- *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 973 (9th Cir. 2002) -- an Article 32 investigating officer does not have true "subpoena" power over third-parties, the proceeding is certainly an integral part of the military disciplinary process.

Moreover, given that the Ninth Circuit has all but directed a finding that the First Hawaiian Bank account records were disclosed without following the RFPA's procedures, and given the Ninth Circuit's decision that no exemption applies, essentially the only question now remaining on remand is one of damages. The statute allows damages of $100 per disclosure plus actual damages and punitive damages for "willful or intentional" violations. 12 U.S.C. § 3417(a). But, in order to assess any possible damages (which could not have been anything related to Marshall Flowers' allegedly "forced" retirement, which was independent of the financial

disclosures[4]), the Court could be required to examine the nature of the disciplinary investigation, the need for an Article 32 proceeding, the motives and state-of-mind of the investigating authorities in issuing the subpoenas to First Hawaiian Bank and Fort Jackson FCU, and other particulars of the process. The Court would be examining "management, discipline, supervision, and control of members of the armed forces" and certainly might "intrude in military affairs, second-guess military decisions, or impair military discipline." *Zaputil*, 335 F.3d at 887.

This involvement in military affairs and discipline is only exemplified by the pending discovery matters, which include whether Marshall Flowers should be allowed to reopen a civil deposition of General James T. Hill, a four-star General who is currently commander of the Southern Command during a time of military conflict in Afghanistan and Iraq. (He seeks, among other things, to increase deposition time to several hours and to compel General Hill's attendance in Hawaii.)

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[4] Stated differently, such alleged "damages" were, at best, caused by allegedly improper larceny charges, not by any disclosure of bank records. The disclosures were a result of the investigation, not a cause of his retirement. The disclosure of account information did not cause him to lose his military position. In this regard, Marshall Flowers (and his wife) would be hard pressed to find any actual damages caused by the disclosure. Moreover, given the ambiguities in the state of the law before the Ninth Circuit's decision in *Flowers* regarding the treatment of Article 32 "subpoenas" it appears unlikely that the disclosure could have been "willful" for purposes of assessing punitive damages. *See, e.g., Russell v. Department of the Air Force*, 915 F. Supp. 1108 (D. Colo. 1996) (addressing use under RFPA of financial records obtained during Article 32 proceedings and appearing to treat such subpoenas as proper).

General Hill was the leader of the 25th Infantry Division when the proceedings were ongoing against then-Sergeant Major Flowers. His testimony to date includes reasons for the Article 32, the subsequent recommendation for seeking a general court-martial against Flowers, and some of the reasons for the agreement between Flowers and the Army for Flowers to accept non-judicial punishment (an Article 15) and to seek immediate retirement in lieu of the Army's proceeding with a general court-martial.

In short, *Feres* appears particularly applicable here, where all indications are that Marshall Flowers is entitled to, at most, $100 in damages for each disclosure.

Although no reported case has applied *Feres* to bar a claim for damages under the RFPA, the U.S. Court of Appeals for the District of Columbia Circuit in a 2-1 decision has determined that *Feres* does *not* bar a claim under the Privacy Act, 5 U.S.C. § 552a(b). *See Cummings v. Department of the Navy*, 350 U.S. App. D.C. 68, 279 F.3d 1051 (D.C. Cir. 2002) (finding *Feres* does not bar a Privacy Act claim for damages by a Navy officer alleging unlawful disclosure of a negative flight evaluation).

*Cummings*, however, relied heavily on specific language of the Privacy Act that "demonstrated that the Congress unambiguously intended to establish a duty that runs from a 'military department' (like the Navy) to military personnel (like [plaintiff]) not to 'disclose any record which is contained in a system of records'." *Id.* at 1054 (referring to 5 U.S.C. §§ 552(f), 552a(g)(1), 552a(k)(5)and 552a(k)(7)). Given this "clear congressional mandate," the D.C. Circuit held that *Feres* "does not extend to Privacy Act lawsuits brought by military personnel against the military departments." *Id.* at 1058. *Cummings* is inconsistent with a decision of the Eighth

Circuit affirming a district court decision that found that the *Feres* doctrine *does* bar, among other things, a Privacy Act claim against the military. *See Uhl v. Swanstrom*, 79 F.3d 751, 756 (8th Cir. 1995) (affirming *Uhl v. Swanstrom*, 876 F. Supp. 1545 (N.D. Iowa 1995)).

In contrast to the Privacy Act, the RFPA itself does not appear to contain such explicit protections for military personnel. At most, a military branch falls within the RFPA's definition of a "government authority." *See* 12 U.S.C. § 3401(3) (defining "Government authority" as "any agency or department of the United States, or any officer, employee, or agent thereof"). There are no other terms in the RFPA specifically mentioning armed services personnel. Moreover, the purpose of the RFPA is different than the Privacy Act. "[T]he focus of the Privacy Act is on the actions of *government* agencies in disclosing personal information maintained by *them* ... In contrast, the RFPA, 12 U.S.C. § 3401 et seq. prohibits *financial institutions* from providing the *government* with information[.]" *Russell*, 915 F. Supp. at 1115-16 (emphasis in original).

*Cummings* is also distinguishable because it did not involve military disciplinary proceedings to the extent this case does. Rather, in *Cummings*, the suit was based upon the military releasing personnel records (allegedly negative flight evaluations of plaintiff who was a military female pilot) to an author writing about training of fighter pilots. As mentioned, the instant case involves an integral part of the military disciplinary process.

Ruling in favor of the government here does not mean military personnel have no right to financial privacy. The question is whether they should have a right to sue for damages for violations if the violations occurred "incident to

service." A finding against Marshall Flowers does not bar a member of the armed services from an action for violations of the RFPA if the disclosure occurred in other circumstances. It also would not bar claims for damages against private financial institutions such as First Hawaiian Bank or Fort Jackson FCU.

Indeed, the Ninth Circuit did state that the RFPA does apply in general to military personnel. *See Flowers*, 295 F.3d at 971 ("It is not disputed that Sergeant Major Flowers, as a member of the armed services when the circumstances in this case occurred, is protected by the RFPA") (citing *United States v. Dowty*, 48 M.J. 102, 109 (1998)). However, even if the RFPA "protects" Flowers, this does not necessarily mean he should be entitled to damages from the Army. Military members can still seek injunctive relief under the RFPA.[5] *See also McDonough v. Widnall*, 891 F. Supp. 1439 (D. Col. 1995) (enjoining under the RFPA the Air Force's use of financial records in court martial proceedings, where records were obtained without following notice provisions of RFPA, but stating that "the questions whether and what [plaintiff] may recover under the provisions of § 3417(a) remain for another day").

In *Flowers* the Ninth Circuit did not reach whether *Feres* bars damages claims. The government had not even raised the issue until now, and this delay does not waive the *Feres* defense. *See Stauber v. Cline*, 837 F.2d 395, 397-98 (9th Cir. 1988) (reasoning that the *Feres* doctrine is viewed as a

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[5] Flowers does not seek any injunctive relief such as precluding the Army from using financial records against him in the Article 32 proceedings or in court martial proceedings. Those charges have been settled; Marshall Flowers retired.

limitation on subject matter jurisdiction and the defense was not waived by failure to raise it until after trial).

Finally, the government also asserts that Marshall Flowers' wife Anna Flowers, even if she is a civilian, is also barred by *Feres* from damages claims against the government under the RFPA. This position has merit. Her claims are entirely derivative of his claims. They are based on the exact same disclosures. A spouse may not seek derivative damages from the government if those damages result from actions of the military against a service member. *See, e.g., Monaco v. United States*, 661 F.2d 129, 133-34 (9th Cir. 1981) (rejecting claim of non-military plaintiff seeking recovery for independent injuries stemming from allegedly negligent acts against military personnel). If Marshall Flowers' claims are barred by *Feres*, so are his wife's.

**3. Other grounds.**

Besides raising the *Feres* issue, the government also seeks dismissal of any claims sounding in tort (e.g., negligent infliction of emotional distress, tortious interference with prospective advantage,[6] violation of a right to privacy) that could be construed as being brought under the Federal Tort Claims Act. The government points out that Flowers has not exhausted administrative remedies for claims under the FTCA as required by 28 U.S.C. § 2675 and § 2401(b). Exhaustion is a jurisdictional prerequisite. Because neither Marshall nor Anna Flowers has exhausted administrative remedies, the

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[6] A claim for interference with contract would be further independently barred under 28 U.S.C. § 2680(h) (excluding from the FTCA, among other claims, any claim arising out of "interference with contract rights").

Court lacks jurisdiction over claims sounding in tort against the government under the FTCA. *United States v. Kubrick*, 444 U.S. 111, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979). Thus, even if the claims were not barred by *Feres*, all claims besides the RFPA claim are also barred by the failure to exhaust.

Moreover, any claim besides an RFPA claim against Major Ohlweiler and Secretary of the Army Thomas E. White, to the extent they are brought against them in their official capacities, are barred by sovereign immunity. *See Brown v. General Serv. Administration*, 425 U.S. 820, 827, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976). Similarly, even assuming there were a constitutional right to privacy in bank records,[7] no claim for damages would exist against the individual federal defendants under *Bivens*. *Libas, Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003) ("*Bivens* claims may be expressly precluded 'when Congress has provided an alternative remedy [such as the RFPA] which it explicitly declares to be a substitute for recovery directly under the Constitution and views as equally effective.'").

The government also points out that there can be no independent state law claim for a violation of privacy in bank records under the Hawaii State Constitution. *See State v. Klattenhoff*, 71 Haw. 598, 801 P.2d 548, 552 (Haw. 1990) ("we adopt the rule set forth in *United States v. Miller*, and follow the majority of states in finding no reasonable expectation of privacy in personal bank records").

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[7] In an earlier order, the Court has dismissed constitutional right to privacy claims based upon *United States v. Miller*, 425 U.S. 435, 440-43, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976) (finding no reasonable expectation of privacy in bank records).

Lastly, the government raises the three-year statute of limitations in 12 U.S.C. § 3416 as to claims by both Marshall and Anna Flowers against Major Ohlweiler. Apparently, Major Ohlweiler was only added as a party in the Second Amended Complaint on March 28, 2003. One question would be whether claims against him, if they exist, would relate back to when the complaint was filed originally in 1999. The length of time also includes the time that this matter was on appeal to the Ninth Circuit. This issue need not be decided because there can be no claims against Ohlweiler even if the claims did relate back. The statute of limitations issue is moot.

## II.

Also at issue is an order of Judge Chang allowing Plaintiffs a renewed opportunity to depose five witnesses, two from Fort Jackson FCU (Velma Jones and Kenneth Creticos) and three from the U.S. Army (General Hill, Major Ohlweiler and Major Bagwell). The order allows Plaintiffs to retake their depositions (which have already been taken by other parties) subject to the following conditions: (1) they must be taken in their respective cities (i.e., not in Hawaii); (2) they must be taken by November 30, 2003; (3) they are limited to two hours; (4) Plaintiffs must reimburse Defendants one-half of costs incurred (including travel costs) in the renewed depositions; and (5) they may be taken by telephone or videoconference.

The Government appeals, contending that Flowers has already had the opportunity to depose the witnesses. Further, especially as to General Hill, the Government contends that Flowers should not be allowed to continue to waste the time of a four-star General. On the other hand, Flowers appeals the conditions placed on the depositions; he seeks more time

to conduct the depositions, to extend the deadline, to remove the reimbursement condition, and to compel witnesses' presence in Hawaii (they are in South Carolina, Washington D.C., and Florida).

Flowers contends that he was not allowed to participate, or he did not allow his lawyer, Mr. Brown, to participate, in the prior depositions because of disputes he was having with Mr. Brown. He has claimed he was "indisposed" previously. Nevertheless, the record reflects that much effort was made to accommodate Mr. Brown in scheduling the depositions and that Marshall Flowers later instructed Mr. Brown not to participate. Mr. Brown told Flowers of the dangers of not participating. Flowers, through his attorney, certainly had a prior opportunity to depose these individuals.

Initially, the appeals appear to be moot as to the government's witnesses. Testimony of the government witnesses would be irrelevant to the only real issue remaining -- that of possible damages to Flowers. Fort Jackson FCU has filed a substantive joinder in the government's appeal. Fort Jackson FCU reiterates the procedural history of how the depositions were scheduled and how Flowers chose not to participate by ordering his attorney not to participate. The Fort Jackson FCU employees presumably are those who had some involvement with receiving the Army subpoenas and disclosing the account information. The only possible relevancy of their testimony would be for punitive damages, if there were some basis to suppose that the disclose was willful and meant to harm Flowers. Nevertheless, the conditions imposed by Judge Chang are reasonable, given that Flowers has had a chance to depose these witnesses previously.

The Court therefore DENIES the appeal of the Plaintiffs objecting to the conditions imposed on any renewed depositions of Fort Jackson FCU employees. The Court GRANTS the government's appeal as to the three Army witnesses. Especially given the dismissal of the government, the testimony of the Army witnesses is irrelevant.

## III.

For the foregoing reasons, the Federal Defendants' Motion to Dismiss is GRANTED. The Federal Defendants' appeal of the September 11, 2003 discovery order is GRANTED and the discovery order is REVERSED to the extent it allows redeposition of the three Army members. Plaintiffs' appeal of the September 11, 2003 discovery order is DENIED and the discovery order is AFFIRMED as to the conditions imposed on any further depositions of Fort Jackson FCU employees.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, October 31, 2003.

/s/
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

## APPENDIX N

## TITLE 12. BANKS AND BANKING
## CHAPTER 35. RIGHT TO FINANCIAL PRIVACY

### 12 USC § 3401. Definitions

For the purpose of this title, the term--

(1) "financial institution", means any office of a bank, savings bank, card issuer as defined in section 1602(n) of this title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands;

(2) "financial record" means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(3) "Government authority" means any agency or department of the United States, or any officer, employee, or agent thereof;

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

(6) "holding company" means--

(A) any bank holding company (as defined in section 1841 of this title);

(B) any company described in section 1843(f)(1) of this title; and

(C) any savings and loan holding company (as defined in the Home Owners' Loan Act [12 USCS §§ 1461 et seq.]);".

(7) "supervisory agency" means with respect to any particular financial institution, holding company, or any subsidiary of a financial institution or holding company, any of the following which has statutory authority to examine the financial condition, business operations, or records or transactions of that institution, holding company, or subsidiary--

(A) the Federal Deposit Insurance Corporation;

(B) [the] Director, Office of Thrift Supervision;

(C) the National Credit Union Administration;

(D) the Board of Governors of the Federal Reserve System;

(E) the Comptroller of the Currency;

(F) the Securities and Exchange Commission;

(G) the Commodity Futures Trading Commission;

(H) the Secretary of the Treasury, with respect to the Bank Secrecy Act [12 USCS §§ 1951 et seq.] and the Currency and Foreign Transactions Reporting Act [31 USCS §§ 5311 et seq.] ( Public Law 91-508, title I and II); or

(I) any State banking or securities department or agency; and

(8) "law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant thereto.

**12 USC § 3402. Access to financial records by Government authorities prohibited; exceptions**

Except as provided by section 3403(c), (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and--

(1) such customer has authorized such disclosure in accordance with section 3404 of this title;

(2) such financial records are disclosed in response to an administrative subpena or summons which meets the requirements of section 3405 of this title;

(3) such financial records are disclosed in response to a search warrant which meets the requirements of section 3406 of this title;

(4) such financial records are disclosed in response to a judicial subpena which meets the requirements of section 3407 of this title; or

(5) such financial records are disclosed in response to a formal written request which meets the requirements of section 3408 of this title.

**12 USC § 3403. Confidentiality of records; financial institutions**

(a) Release of records by financial institutions prohibited.

No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this title.

(b) Release of records upon certification of compliance with chapter.

A financial institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions of this chapter.

(c) Notification to Government authority of existence of relevant information in records.

Nothing in this chapter shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. Such information may include only the name or other identifying information concerning any individual, corporation or account involved in and the nature of any suspected illegal activity. Such information may be disclosed notwithstanding any constitution, law, or regulation of any State or political subdivision thereof to the contrary. Any financial institution, or officer, employee, or agent thereof, making a disclosure of information pursuant to this subsection, shall not be liable to the customer under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the customer of such disclosure.

(d) Release of records as incident to perfection of security interest, proving a claim in bankruptcy, collecting a debt, or processing an application with regard to a Government loan, loan guarantee, etc.

(1) Nothing in this title shall preclude a financial institution, as an incident to perfecting a security interest, proving a claim in bankruptcy, or otherwise collecting on a debt owing either to the financial institution itself or in its role as a fiduciary, from providing copies of any financial record to any court or Government authority.

(2) Nothing in this title shall preclude a financial institution, as an incident to processing an application for assistance to a customer in the form of a Government loan, loan guaranty, or loan insurance agreement, or as an incident to processing a default on, or administering, a Government guaranteed or insured loan, from initiating contact with an appropriate Government authority for the purpose of providing any financial record necessary to permit such authority to carry out its responsibilities under a loan, loan guaranty, or loan insurance agreement.

**12 USC § 3404. Customer authorizations**

(a) Statement furnished by customer to financial institution and Government authority; contents.

A customer may authorize disclosure under section 3402(1) of this title if he furnishes to the financial institution and to the Government authority seeking to obtain such disclosure a signed and dated statement which--

(1) authorizes such disclosure for a period not in excess of three months;

(2) states that the customer may revoke such authorization at any time before the financial records are disclosed;

(3) identifies the financial records which are authorized to be disclosed;

(4) specifies the purposes for which, and the Government authority to which, such records may be disclosed; and

(5) states the customer's rights under this title.

(b) Authorization as condition of doing business prohibited.

No such authorization shall be required as a condition of doing business with any financial institution.

(c) Right of customer to access to financial institution's record of disclosures.

The customer has the right, unless the Government authority obtains a court order as provided in section 3409 of this title, to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a Government authority pursuant to this section, including the identity of the Government authority to which such disclosure is made.

**12 USC § 3407. Judicial subpena**

A Government authority may obtain financial records under section 3402(4) of this title pursuant to judicial subpena only if--

(1) such subpena is authorized by law and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

(2) a copy of the subpena has been served upon the customer or mailed to his last known address on or before the date on which the subpena was served on the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

Records or information concerning your transactions which are held by the financial institution named in the

attached subpena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must:

1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

2. File the motion and statement by mailing or delivering them to the clerk of the Court.

3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to.

4. Be prepared to come to court and present your position in further detail.

5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer; and

(3) ten days have expired from the date of service or fourteen days from the date of mailing of the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate

court, or the customer challenge provisions of section 3410 of this title have been complied with.

## 12 USC § 3408. Formal written request

A Government authority may request financial records under section 3402(5) of this title pursuant to a formal written request only if--

(1) no administrative summons or subpena authority reasonably appears to be available to that Government authority to obtain financial records for the purpose for which such records are sought;

(2) the request is authorized by regulations promulgated by the head of the agency or department;

(3) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and

(4) (A) a copy of the request has been served upon the customer or mailed to his last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:

Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose:

If you desire that such records or information not be made available, you must:

1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the

records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:.

3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to.

4. Be prepared to come to court and present your position in further detail.

5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and

(B) ten days have expired from the date of service or fourteen days from the date of mailing of the notice by the customer and within such time period the customer has not filed a sworn statement and an application to enjoin the Government authority in an appropriate court, or the customer challenge provisions of section 1110 [12 USCS § 3410] have been complied with.

**12 USC § 3410. Customer challenges**

(a) Filing of motion to quash or application to enjoin; proper court; contents.

Within ten days of service or within fourteen days of mailing of a subpena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpena shall be filed in the court which issued the subpena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court. Such motion or application shall contain an affidavit or sworn statement--

(1) stating that the applicant is a customer of the financial institution from which financial records pertaining to him have been sought; and

(2) stating the applicant's reasons for believing that the financial records sought are not relevant to the legitimate law enforcement inquiry stated by the Government authority in its notice, or that there has not been substantial compliance with the provisions of this chapter.

Service shall be made under this section upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, "delivery" has the meaning stated in rule 5(b) of the Federal Rules of Civil Procedure.

(b) Filing of response; additional proceedings.

If the court finds that the customer has complied with subsection (a), it shall order the Government authority to file a sworn response, which may be filed in camera if the Government includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.

(c) Decision of court.

If the court finds that the applicant is not the customer to whom the financial records sought by the Government authority pertain, or that there is a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry, it shall deny the motion or application, and, in the case of an administrative summons or court order other than a search warrant, order such process enforced. If the court finds that the applicant is the customer to whom the records sought by the Government authority pertain, and that there is not a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry, or that there has not been substantial compliance with the provisions of this title, it shall order the process quashed or shall enjoin the Government authority's formal written request.

(d) Appeals.

A court ruling denying a motion or application under this section shall not be deemed a final order and no interlocutory appeal may be taken therefrom by the customer. An appeal of a ruling denying a motion or application under this section may be taken by the customer (1) within such period of time as provided by law as part of any appeal from a final order in any legal proceeding initiated against him arising out of or based upon the financial records, or (2) within thirty days after a notification that no legal proceeding is contemplated against him. The Government authority obtaining the financial records shall promptly notify a customer when a determination has been made that no legal proceeding against him is contemplated. After one hundred and eighty days from the denial of the motion or application, if the Government authority obtaining the records has not initiated such a proceeding, a supervisory official of the Government authority shall certify to the appropriate court that no such determination has been made. The court may require that such certifications be made, at reasonable intervals thereafter, until either notification to the customer has occurred or a legal proceeding is initiated as described in clause (A).

(e) Sole judicial remedy available to customer.

The challenge procedures of this chapter constitute the sole judicial remedy available to a customer to oppose disclosure of financial records pursuant to this chapter.

(f) Affect on challenges by financial institutions.

Nothing in this title shall enlarge or restrict any rights of a financial institution to challenge requests for records made by a Government authority under existing law. Nothing in this

chapter shall entitle a customer to assert the rights of a financial institution.

**12 USC § 3413. Exceptions**

(a) Disclosure of financial records not identified with particular customers.

Nothing in this title prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.

(b) Disclosure to, or examination by, supervisory agency pursuant to exercise of supervisory, regulatory, or monetary functions with respect to financial institutions, holding companies, subsidiaries, institution-affiliated parties, or other persons.

This chapter shall not apply to the examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions, including conservatorship or receivership functions, with respect to any financial institution, holding company, subsidiary of a financial institution or holding company, institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to a financial institution, holding company, or subsidiary, or other person participating in the conduct of the affairs thereof.

(c) Disclosure pursuant to Title 26.

Nothing in this title prohibits the disclosure of financial records in accordance with procedures authorized by title 26.

(d) Disclosure pursuant to Federal statute or rule promulgated thereunder.

Nothing in this title shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder.

(e) Disclosure pursuant to Federal Rules of Criminal Procedure or comparable rules of other courts.

Nothing in this title shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.

**12 USC § 3416. Jurisdiction**

An action to enforce any provision of this title may be brought in any appropriate United States district court without regard to the amount in controversy within three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later.

**12 USC § 3417. Civil penalties**

(a) Liability of agencies or departments of United States or financial institutions.

Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this title is liable to the customer to whom such records relate in an amount equal to the sum of--

(1) $100 without regard to the volume of records involved;
(2) any actual damages sustained by the customer as a result of the disclosure;
(3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and
(4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Disciplinary action for willful or intentional violation of chapter by agents or employees of department or agency.

Whenever the court determines that any agency or department of the United States has violated any provision of this title and the court finds that the circumstances surrounding the violation raise questions of whether an officer or employee of the department or agency acted willfully or intentionally with respect to the violation, the Director of the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. The Director after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Director recommends.

(c) Good faith defense.

Any financial institution or agent or employee thereof making a disclosure of financial records pursuant to this

chapter in good-faith reliance upon a certificate by any Government authority or pursuant to the provisions of section 3413(l) of this title shall not be liable to the customer for such disclosure under this title, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(d) Exclusive judicial remedies and sanctions.

The remedies and sanctions described in this title shall be the only authorized judicial remedies and sanctions for violations of this chapter.

## APPENDIX O

## FEDERAL REGULATIONS INVOLVED

## PART 275—OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS: RIGHTS TO FINANCIAL PRIVACY ACT OF 1978

AUTHORITY: 92 Stat. 3697 et seq. (12 U.S.C. 3401, et seq.)

SOURCE: 45 FR 17576, Mar. 19, 1980, unless otherwise noted. Redesignated at 56 FR 57984, Nov. 15, 1991.

**§275.1 Purpose.**

This part implements Title 12, U.S.C. section 3401, et seq., Pub. L. 95-630, "Right to Financial Privacy Act of 1978," and prescribes the procedures for the Department of Defense to use to gain access to financial records maintained by financial institutions.

**§ 275.2 Applicability and scope.**

(a) The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Defense Investigative Service, and the National Security Agency (hereafter referred to as the "DoD Components").

(b) Its provisions apply only to financial records maintained by financial institutions as defined in § 275.6(a).

[45 FR 17576, Mar. 19, 1980. Redesignated and amended at 56 FR 57984, Nov. 15, 1991]

**§ 275.3 Policy.**

(a) It is the policy of the Department of Defense when obtaining financial records from a financial institution to seek the consent of the customer to whom the record pertains, unless doing so compromises or harmfully delays a legitimate law enforcement inquiry. If the person declines to consent to disclosure, the alternative means of obtaining the records authorized by this part shall be utilized.

(b) The provisions of 12 U.S.C. 3401 et seq. do not govern obtaining access to financial records maintained by military banking contractors located outside of the United States, the District of Columbia, Guam, American Samoa, or the Virgin Islands. The procedures outlined in enclosure 5 may be followed in obtaining financial information from these facilities.

[45 FR 17576, Mar. 19, 1980, as amended at 46 FR 29706, June 3, 1981]

**§ 275.4 Information requirements.**

The report required by § 275.14 of this part is assigned Report Control Symbol DD-COMP(A) 1538.

[45 FR 17576, Mar. 19, 1980. Redesignated and amended at 56 FR 57984, Nov. 15, 1991]

**§ 275.5 Responsibilities.**

(a) *Heads* of affected *DoD Components* shall:

(1) Follow the procedures outlined in this part when seeking access to financial records.

(2) Establish procedures for implementing this part within the Component.

(3) Established procedures to ensure that the report required by § 275.14 is forwarded to the Defense Privacy Board, Office of the Deputy Assistant Secretary of Defense (Administration).

(b) The *Deputy Assistant Secretary of Defense (Administration),* or designee, shall:

(1) Prepare a consolidated DoD annual report required by 12 U.S.C. 3421(b) and § 275.14.

(2) Provide policy guidance to DoD Components to implement this part.

[45 FR 17576, Mar. 19, 1980. Redesignated and amended at 56 FR 57984, Nov. 15, 1991]

**§ 275.6 Definitions.**

(a) *Financial institution.* Any office of a bank, savings bank, credit card issuer, industrial loan company, trust company, savings and loan, building and loan, homestead association (including cooperative banks), credit union, or consumer finance institution that is located in any State or territory of the United States, or in the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(b) *Financial record.* An original, its copy, or information known to have been extracted from the original record held by a financial institution that pertains to a customer's relationship with the financial institution.

(c) *Person.* An individual or a partnership of five or less individuals.

(d) *Customer.* Any person or authorized representative of that person who used or is using any service of a financial institution or for whom a financial institution is acting or has acted as fiduciary for an account maintained in the name of that person.

(e) *Law enforcement office.* Any element of a DoD Component authorized by the Component head to conduct law enforcement inquiries.

(f) *Law enforcement inquiry.* A lawful investigation or official proceeding that inquires into a violation of or failure to comply with a criminal or civil statute, or any rule, regulation, or order issued pursuant thereto.

(g) *Personnel security investigation.* An investigation required to determine a person's eligibility for access to classified information, assignment or retention in sensitive duties, or other designated duties requiring such investigation. Personnel security investigations include investigations of subversive affiliations, suitability information, or hostage situations conducted for the purpose of making personnel security determinations; and also include investigations of allegations that arise subsequent to adjudicative action that require resolution to determine an individual's current eligibility for access to classified information, or assignment or retention in a sensitive position.

(h) *Personnel security element.* Any element of a DoD Component authorized by the Secretary of Defense to conduct personnel security investigations.

**§275.7 Requesting basic identifying account information.**

(a) A DoD law enforcement office may issue a formal written request for basic identifying account information to a financial institution relevant to a legitimate law enforcement

inquiry. A request may be issued to a financial institution for any or all of the following identifying data:

(1) Name.

(2) Address.

(3) Account Number.

(4) Type of account of any customer or ascertainable group of customers associated with a financial transaction or class of financial transactions.

## PART 504—OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS

AUTHORITY: 12 U.S.C. 3401 *et seq.*, Pub. L. 95-630, unless otherwise noted.

SOURCE: 46 FR 60195, Dec. 9, 1981, unless otherwise noted.

### § 504.1 General.

(a) *Purpose.* This regulation provides DA policies, procedures, and restrictions governing access to and disclosure of financial records maintained by financial institutions during the conduct of Army investigations or inquiries.

(b) *Applicability and scope.* (1) This regulation applies to all DA investigative activities conducted by the Active Army, the Army National Guard, and the US Army Reserve.

(2) The provisions of 12 U.S.C. 3401 et seq. do not govern obtaining access to financial records maintained by financial institutions located outside of the states or territories of the United States, Puerto Rico, the District of Columbia, Guam, American Samoa, or the Virgin Islands. The procedures outlined in § 504.2(d)(4) will be followed in seeking access to financial information from these facilities.

(3) This regulation applies only to financial records maintained by financial institutions as defined in § 504.1(c)(1).

(c) *Explanation of terms.* For purposes of this regulation, the following terms apply:

(1) *Financial Institution.* Any office of a–

(i) Bank.

(ii) Savings bank.

(iii)Credit card issuer as defined in section 103 of the Consumers Credit Protection Act (15 U.S.C. 1602(n)).

(iv)Industrial loan company.

(v) Trust company.

(vi)Savings and loan association.

(vii) Building and loan association.

(viii) Homestead association (including cooperative banks).

(ix)Credit union.

(x) Consumer finance institution. This includes only those offices located in any State or territory of the United States, or in the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(xi) Military banking contractors located outside the States or territories of the United States or the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(2) *Financial record.* An original record, its copy, or information known to have been derived from the original record held by a financial institution, pertaining to a customer's relationship with the financial institution.

(3) *Person.* An individual or partnership of five or fewer individuals. (Per DODD 5400.12.)

(4) *Customer.* Any person or authorized representative of that person–

(i) Who used or is using any service of a financial institution.

(ii) For whom a financial institution is acting or has acted as a fiduciary for an account maintained in the name of that person.

(5) *Law enforcement inquiry.* A lawful investigation or official proceeding that inquires into a violation of, or failure to comply with, a criminal or civil statute or any enabling regulation, rule, or order issued pursuant thereto.

(6) *Army law enforcement office.* Any army element, agency, or unit authorized to conduct investigations under the Uniform Code of Military Justice or Army regulations. This broad definition of, Army law enforcement office includes military police, criminal investigation, inspector general, and military intelligence activities conducting investigations of violations of law or regulation.

(7) *Personnel security investigation.* An investigation required to determine a person's eligibility for access to classified information, assignment or retention in sensitive duties, or other designated duties requiring such investigation. Personnel security investigation includes investigations of subversive affiliations, suitability information, or hostage situations conducted to make personnel security determinations. It also includes investigations of allegations that–

(i) Arise after adjudicative action, and

(ii) Require resolution to determine a person's current eligibility for access to classified information or assignment or retention in a sensitive position. Within DA, personnel security investigations are conducted by the Defense Investigative Service.

(d) *Policy*—(1) *Customer consent.* It is DA policy to seek customer consent to obtain a customer's financial records from a financial institution unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry. If the person declines to consent to disclosure, the alternative

means of obtaining the records authorized by this regulation will be used. (See § 504.2 (c) through (g).)

(2) *Access requests.* Except as provided in paragraph (d)(3) of this section and §§ 504.1(f)(1), 504.2(g) and 504.20) Army investigative elements may not have access to or obtain copies of the information in the financial records of any customer from a financial institution unless the financial records are reasonably described and the–

(i) Customer has authorized such disclosure (5 504.2(b));

(ii) Financial records are disclosed in response to a search warrant which meets the requirements of § 504.2 (d);

(iii)Financial records are disclosed in response to a judicial subpoena which meets the requirements of § 504.2(e); or

(iv)Financial records are disclosed in response to a formal written request which meets the requirements of § 504.2(f).

(3) *Voluntary information.* Nothing in this regulation will preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying an Army investigative element that such institution, or officer, employee or agent has information which may be relevant to a possible violation of any statute or regulation.

(e) *Authority.* (1) Law enforcement offices are authorized to obtain records of financial institutions per this regulation, except as provided in § 504.2(e).

(2) The head of a law enforcement office, of field grade rank or higher (or an equivalent grade civilian official), is authorized to initiate requests for such records.

(f) *Exceptions and waivers.* (1) A law enforcement office may issue a formal written request for basic identifying account information to a financial institution as part of a legitimate law enforcement inquiry. The request may be issued for any or all of the following identifying data:

(i) Name.

(ii) Address.

(iii)Account number.

(iv)Type of account of any customer or ascertainable group of customers associated with a financial transaction or class of financial transactions.

(2) A request for disclosure of the above specified basic identifying data on a customer's account may be issued without complying with the customer notice, challenge, or transfer procedures described in § 504.2. However, if access to the financial records themselves is required, the procedures in § 504.2 must be followed. (A sample format for requesting basic identifying account data is in app. A.)

(3) No exceptions or waivers will be granted for those portions of this regulation required by law. Submit requests for exceptions or waivers of other aspects of this regulation to HQDA(DAPE-HRE), WASH, DC 20310.

**§ 504.2 Procedures.**

(a) *General.* A law enforcement official seeking access to a person's financial records will, when feasible, obtain the customer's consent. This chapter also sets forth other authorized procedures for obtaining financial records if it is not feasible to obtain the customer's consent. Authorized procedures for obtaining financial records follow. All communications with a US Attorney or a US District Court, as required by this regulation, will be coordinated with the supporting staff judge advocate before dispatch.

(b) *Customer consent.* (1) A law enforcement office or personnel security element may gain access to or a copy of a customer's financial records by obtaining the customer's consent and authorization in writing. (See app. B for a sample format.) Any consent obtained under the provisions of this paragraph must–

(i) Be in writing, signed, and dated.

(ii) Identify the particular financial records being disclosed.

(iii)State that the customer may revoke the consent at any time before disclosure.

(iv)Specify the purpose of disclosure and to which agency the records may be disclosed.

(v) Authorize the disclosure for a period not over 3 months.

(vi)Contain a "Statement of Customer Rights Under the Right to Financial Privacy Act of 1978" (app. B).

(2) Any customer's consent not containing all of the elements listed in paragraph a of this section will not be valid.

(3) A copy of the customer's consent will be made a part of the law enforcement inquiry file.

(4) A certification of compliance with 12 U.S.C. 3401 *et seq.* (app. C), along with the customer's consent, will be provided to the financial institution as a prerequisite to obtaining access to the financial records.

(5) The annual reporting requirements of § 504.2(m) apply to requests made to a financial institution even with the customer's consent.

(c) *Administrative summons or subpoena.* The Army has no authority to issue an administrative summons or subpoena for access to financial records.

(d) *Search warrant.* (1) A law enforcement office may obtain financial records by using a search warrant obtained under Rule 41 of the Federal Rules of Criminal Procedure in appropriate cases.

(2) No later than 90 days after the search warrant is served, unless a delay of notice is obtained under § 504.2(i), a copy of the search warrant and the following notice must be mailed to the customer's last known address:

> Records or information concerning your transactions held by the financial institution named in the attached

search warrant were obtained by this (office/agency/unit) on (date) for the following purpose: (state purpose). You may have rights under the Right to Financial Privacy Act of 1978.

(3) Search authorization signed by installation commanders or military judges will not be used to gain access to financial records from financial institutions in any State or territory of the United States.

(4) Access to financial records maintained by military banking contractors in oversea areas or by other financial institutions located on DOD installations outside the United States, Puerto Rico, the District of Columbia, Guam, American Samoa, or the Virgin Islands is preferably obtained by customer consent.

(i) In cases where it would not be appropriate to obtain this consent or such consent is refused and the financial institution is not otherwise willing to provide access to its records, the law enforcement activity may seek access by use of a search authorization. This authorization must be prepared and issued per AR 27-10, Legal Services.

(ii) Information obtained under this paragraph should be properly identified as financial information. It should be transferred only where an official need-to-know exists. Failure to do so, however, does not render the information inadmissable in courts-martial or other proceedings.

(iii)Law enforcement activities seeking access to financial records maintained by all other financial institutions overseas will comply with local foreign statutes or procedures governing such access.

(e) *Judicial subpoena.* Judicial subpoenas–

(1) Are those subpoenas issued in connection with a pending judicial proceeding.

(2) Include subpoenas issued under paragraph 115 of the Manual for Courts-Martial and Article 46 of the Uniform

Code of Military Justice. The servicing staff judge advocate will be consulted on the availability and use of judicial subpoenas. The notice and challenge provisions of 12 U.S.C. 3407 and 3410 will be followed.

(f) *Formal written request.* (1) A law enforcement office may formally request financial records when the records are relevant to a legitimate law enforcement inquiry. This request may be issued only if–

(i) The customer has declined to consent to the disclosure of his or her records, or

(ii) Seeking consent from the customer would compromise or harmfully delay a legitimate law enforcement inquiry.

(2) A formal written request will be in a format set forth in appendix D and will–

(i) State that the request is issued under the Right to Financial Privacy Act of 1978 and this regulation.

(ii) Described the specific records to be examined.

(iii)State that access is sought in connection with a legitimate law enforcement inquiry.

(iv)Describe the nature of the inquiry.

(v) Be signed by the head of the law enforcement office or a designee (persons specified in § 504.1(e)(2)).

(3) At the same time or before a formal written request is issued to a financial institution, a copy of the request will be personally served upon or mailed to the customer's last known address unless a delay of customer notice has been obtained under § 504.2(i). The notice to the customer will be–

(i) In a format similar to appendix E.

(ii) Personally served at least 14 days or mailed at least 18 days before the date on which access is sought.

(4) The official who signs the customer notice is designated to receive any challenge from the customer.

(5) The customer will have 14 days to challenge a notice request when personal service is made, and 18 days when service is by mail.

(6) The head of the law enforcement office initiating the formal written request will set up procedures to insure that no access to financial records is attempted before expiration of the above time periods–

(i) While awaiting receipt of a potential customer challenge, or

(ii) While awaiting the filing of an application for an injunction by the customer.

(7) Proper preparation of the formal written request and notice to the customer requires preparation of motion papers and a statement suitable for court filing by the customer. Accordingly, the law enforcement office intending to initiate a formal written request will coordinate preparation of the request, the notice, motion papers, and sworn statement with the supporting staff judge advocate. These documents are required by statute; their preparation cannot be waived.

(8) The supporting staff judge advocate is responsible for liaison with the proper United States Attorney and United States District Court. The requesting official will coordinate with the supporting staff judge advocate to determine whether the customer has filed a motion to prevent disclosure of the financial records within the prescribed time limits.

(9) The head of the law enforcement office (§ 504.2(f)(2)) will certify in writing (see app. C) to the financial institution that such office has complied with the requirements of 12 U.S.C. 3401 *et seq.*–

(i) When a customer fails to file a challenge to access to financial records within the above time periods, or

(ii) When a challenge is adjudicated in favor of the law enforcement office. No access to any financial records will be made before such certification is given.

(g) *Emergency access.* (1) In some cases, the requesting law enforcement office may determine that a delay in obtaining access would create an imminent danger of–

(i) Physical injury to a person,

(ii) Serious property damage, or

(iii)Flight to avoid prosecution. Section 504.2(g)(2)(3) provides for emergency access in such cases of imminent danger. (No other procedures in this regulation apply to such emergency access.)

(2) When emergency access is made to financial records, the requesting official (§ 504.1(e)(2)) will–

(i) Certify in writing (in a format similar to that in app. C) to the financial institution that the provisions of 12 U.S.C. 3401 *et seq.* have been complied with as a prerequisite to obtaining access.

(ii) File with the proper court a signed, sworn statement setting forth the grounds for the emergency access within 5 days of obtaining access to financial records.

(3) After filing of the signed, sworn statement, the official who has obtained access to financial records under this paragraph will–

(i) Personally serve or mail to the customer a copy of the request to the financial institution and the following notice, unless a delay of notice has been obtained under § 504.2(i):

> Records concerning your transactions held by the financial institution named in the attached request were obtained by (office/agency/unit) under the Right to Financial Privacy Act of 1978 on (date) for the following purpose: (state with reasonable detail the nature of the law enforcement inquiry). Emergency access to such records was obtained on the grounds that (state grounds).

(ii) Insure that mailings under this section will be by certified or registered mail to the last known address of the customer.

(4) The annual reporting requirements of § 504.2(m) apply to any request for access under this section.

(h) *Release of information obtained from financial institutions*—(1) *Records notice.* Financial records, to include derived information, obtained under 12 U.S.C. 3401 *et seq.* will be marked as follows:

> This record was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq., and may not be transferred to another Federal agency or department outside DOD without prior compliance with the transferring requirements of 12 U.S.C. 3412.

(2) *Records transfer.* (i) Financial records originally obtained under this regulation will not be transferred to another agency or department outside the DOD unless the transferring law enforcement office certifies their relevance in writing. Certification will state that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry within the Jurisdiction of the receiving agency or department. To support this certification, the transferring office may require that the requesting agency submit adequate justification for its request. File a copy of this certification with a copy of the released records.

(ii) Unless a delay of customer notice has been obtained (§ 504.2(i)), the transferring law enforcement office will, within 14 days, personally serve or mail the following to the customer at his or her last known address–

(A) A copy of the certification made according to § 504.2(h)(2)(i) and

(B) The following notice, which will state the nature of the law enforcement inquiry with reasonable detail:

> Copies of, or information contained in, your financial records lawfully in possession of the Department of the Army have been furnished to (state the receiving

agency or department) pursuant to the Right to Financial Privacy Act of 1978 for (state the purpose). If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Financial Privacy Act of 1978 or the Privacy Act of 1974.

(iii)If a request for release of information is from a Federal agency authorized to conduct foreign intelligence or foreign counterintelligence activities (Executive Order 12036) and is for purposes of conducting such activities by these agencies, the information will be released without notifying the customer, unless permission to provide notification is given in writing by the requesting agency.

(iv)Financial information obtained before the effective date of the Financial Privacy Act of 1978 (10 March 1978) may continue to be provided to other agencies according to existing procedures, to include applicable Privacy Act System Notices published in AR 340-21 series.

(3) *Precautionary measures.* Whenever financial data obtained under this regulation is incorporated into a report of investigation or other correspondence, precautions must be taken to insure that–

(i) The report or correspondence is not is not distributed outside of DOD except in compliance with paragraph (h)(2)(ii)(B) of this section.

(ii) The report or other correspondence contains the following warning restriction on the first page or cover:

Some of the information contained herein (cite specific paragraphs) is financial record information which was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq. This information may not be released to another Federal agency or department outside the DOD without compliance with

the specific requirements of 12 U.S.C. 3412 and AR 190-6.

(i) *Delay of customer notice procedures*—(1) *Length of delay*. The customer notice required by formal written request (§ 504.2(g)(3)), emergency access (§ 504.2(g)(3)), and release of information (§ 504.2(h)(2)(iii)) may be delayed for successive periods of 90 days. The notice required for search warrant (§ 504.2(d)(2)) may be delayed for one period of 180 days and successive periods of 90 days.

(2) *Conditions for delay*. A delay of notice may be granted only by a court of competent jurisdiction. This will be done only when not granting a delay in serving the notice would result in–

(i) Endangering the life or physical safety of any person.

(ii) Flight from prosecution.

(iii)Destruction of or tampering with evidence.

(iv)Intimidation of potential witnesses.

(v) Otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same degree as the circumstances in § 504.2(i)(2)(ii) through (iv).

(3) *Coordination*. When a delay of notice is appropriate, the law enforcement office involved will consult with the supporting staff judge advocate to obtain such a delay. Applications for delays of notice should contain reasonable detail.

(4) *After delay expiration*. Upon the expiration of a delay of notice under above and required by–

(i) Section 504.2(d)(1), the law enforcement office obtaining financial records will mail to the customer a copy of the search warrant and the following notice.

Records or information concerning your transactions held by the financial institution named in

> the attached search warrant were obtained by this (agency or office) on (date). Notification was delayed beyond the statutory 90-day delay period pursuant to a determination by the court that such notice would seriously jeopardize an investigation concerning (state with reasonable detail). You may have rights under the Right to Financial Privacy Act of 1978.

(ii) Section 504.2(f)(3), the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the process or request and the following notice:

> Records or information concerning your transactions which are held by the financial institution named in the attached process or request were supplied to or requested by the government authority named in the process or request on (date). Notification was withheld pursuant to a determination by the (title of the court so ordering) under the Right to Financial Privacy Act of 1978 that such notice might (state reason). The purpose of the investigation or official proceeding was (state purpose with reasonable detail).

(iii)Section 504.2(g)(3), the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the request and the notice required by 8 504.2(g)(3).

(iv)Section 504.2(h)(2), the law enforcement office transferring financial records will serve personally or mail to the customer the notice required by § 504.2(0(3). If the law enforcement office was responsible for obtaining the court order authorizing the delay, such office shall also serve personally or by mail to the customer the notice required in § 504.2(f)(3).

(5) *Annual reports.* The annual reporting requirements of § 504.2(m) apply to delays of notice sought or granted under this paragraph.

(j) *Foreign intelligence and foreign counterintelligence activities.* (1) Except as indicated below, nothing in this regulation applies to requests for financial information in connection with authorized foreign intelligence and foreign counterintelligence activities as defined in Executive Order 12036. Appropriate foreign intelligence and counterintelligence directives should be consulted in these instances.

(2) However, to comply with the Financial Privacy Act of 1978, the following guidance will be followed for such requests. When a request for financial records is made–

(i) A military intelligence group commander, the chief of an investigative control office, or the Commanding General (or Deputy CG), US Army Intelligence and Security Command, will certify to the financial institution that the requesting activity has complied with the provisions of 12 U.S.C. 3403(b).

(ii) The requesting official will notify the financial institution from which records are sought that 12 U.S.C. 3414(a)(3) prohibits disclosure to any person by the institution, its agents, or employees that financial records have been sought or obtained.

(3) The annual reporting requirements shown in § 504.2(m) apply to any request for access under this section.

(k) *Certification.* A certificate of compliance with the Right of Financial Privacy Act of 1978 (app. C) will be provided to the financial institution as a prerequisite to obtaining access to financial records under the following access procedures:

(1) Customer consent (§ 504.2(b)).

(2) Search warrant (§ 504.2(d)).

(3) Judicial subpoena (§ 504.2(e)).

(4) Formal written request (§ 504.2(f)).

(5) Emergency access (§ 504.2(g)).

(6) Foreign intelligence and foreign counterintelligence activities (§ 504.2(j)).

(l) *Penalties*. Obtaining or disclosing financial records or financial information on a customer from a financial institution in violation of the Act or this regulation may subject the Army to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the Act or this regulation may be subject to disciplinary action.

(m)*Right to Financial Privacy Act of 1978 Annual Report (RCS DD-COMP(A)1538)*. (1) Major Army commanders will submit this report to HQDA(DAPE-HRE) concerning requests for financial information from financial institutions. Reports are to include all queries requested or information obtained under the provisions of this regulation by subordinate Army law enforcement offices (as defined in § 504.1(c)(6)). Negative reports will be submitted.

(2) This report is to arrive at HQDA(DAPE-HRE), WASH, DC 20310, not later than 1 February following the calendar year reported.

(3) The annual report will contain the number of–

(i) Requests for access to financial institutions, specifying the types of access and any other information deemed relevant or useful.

(ii) Customer challenges to access and whether they were successful.

(iii)Transfers to agencies outside of the DOD of information obtained under this regulation.

(iv)Customer challenges to the transfer of information and whether they were successful.

(v) Applications for delay of notice, the number granted, and the names of the officials requesting such delays.

(vi) Delay of notice extensions sought and the number granted.

(vii) Refusals by financial institutions to grant access, by category of authorization, such as customer consent or formal written request.

(4) A consolidated Army report will be submitted by HQDA(DAPE-HRE) to the Defense Privacy Board, Office of the Deputy Assistant Secretary of Defense (Administration), by 15 February each year.

## APPENDIX A TO PART 504—REQUEST FOR BASIC IDENTIFYING ACCOUNT DATA—SAMPLE FORMAT

*(Official Letterhead)*

(Date)_____

Mr./Mrs._____

*Chief Teller (as appropriate), First National Bank, Little Rock, AR 72203.*

Dear Mr./Mrs. _____: In connection with a legitimate law enforcement inquiry and pursuant to section 3414(g) of the Right to Financial Privacy Act of 1978, section 3401 et seq., Title 12, United States Code, you are requested to provide the following account information: (name, address, account number, and type of account of any customer or ascertainable group of customers associated with a certain financial transaction or class of financial transactions as set forth in § 504.1(f).

I hereby certify, pursuant to section 3403(b) of the Right to Financial Privacy Act of 1978, that the provisions of the Act have been complied with as to this request for account information.

(Official Signature Block) _____

Under section 3417(c) of the Act, good faith reliance upon this certification relieves your institution and its employees

and agents of any possible liability to the subject in connection with the disclosure of the requested financial records.

## APPENDIX B TO PART 504—CUSTOMER CONSENT AND AUTHORIZATION FOR ACCESS—SAMPLE FORMAT

Pursuant to section 3404(a) of the Right to Financial Privacy Act of 1978, I, (name of customer), having read the explanation of my rights on the reverse side, hereby authorize the (name and address of financial institution) to disclose these financial records: (list of particular financial records) to (Army law enforcement office) for the following purpose(s): (specify the purpose(s)).

I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are disclosed, and that this authorization is valid for no more than 3 months from the date of my signature.

Date: _____

Signature: _____

(Typed name)

(Mailing address of customer)

## STATEMENT OF CUSTOMER RIGHTS UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

Federal law protects the privacy of your financial records. Before banks, savings and loan associations, credit unions, credit card issuers, or other financial institutions may give financial information about you to a Federal agency, certain procedures must be followed.

### *Consent to Financial Records*

You may be asked to consent to the financial institution making your financial records available to the Government.

You may withhold your consent, and your consent is not required as a condition of doing business with any financial institution. If you give your consent, it can be revoked in writing at any time before your records are disclosed. Furthermore, any consent you give is effective for only 3 months and your financial institution must keep a record of the instances in which it discloses your financial information.

*Without Your Consent*

Without your consent, a Federal agency that wants to see your financial records may do so ordinarily only by means of a lawful subpoena, summons, formal written request, or search warrant for that purpose. Generally, the Federal agency must give you advance notice of its request for your records explaining why the information is being sought and telling you how to object in court. The Federal agency must also send you copies of court documents to be prepared by you with instructions for filling them out. While these procedures will be kept as simple as possible, you may want to consult an attorney before making a challenge to a Federal agency's request.

*Exceptions*

In some circumstances, a Federal agency may obtain financial information about you without advance notice or your consent. In most of these cases, the Federal agency will be required to go to court for permission to obtain your records without giving you notice beforehand. In these instances, the court will make the Government show that its investigation and request for your records are proper. When the reason for the delay of notice no longer exists, you will usually be notified that your records were obtained.

*Transfer of Information*

Generally, a Federal agency that obtains your financial records is prohibited from transferring them to another Federal agency unless it certifies in writing the transfer is proper and sends a notice to you that your records have been sent to another agency.

*Penalties*

If the Federal agency or financial institution violates the Right to Financial Privacy Act, you may sue for damages or seek compliance with the law. If you win, you may be repaid your attorney's fee and costs.

*Additional Information*

If you have any questions about your rights under this law, or about how to consent to release your financial records, please call the official whose name and telephone number appears below:

_____

(Last Name. First Name, Middle Initial) Title (Area Code) (Telephone Number)

_____

(Component activity, address)

APPENDIX C TO PART 504—CERTIFICATE OF COMPLIANCE WITH THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978-SAMPLE FORMAT

*(Official Letterhead)*

Mr./Mrs. _____,

*Manager, Army Federal Credit Union, Fort Ord, CA 93941.*

Dear Mr./Mrs._____: I certify, pursuant to section 3403(b) of the Right to Financial Privacy Act of 1978. section 3401 et seq., Title 12, United States Code, that the applicable provisions of that statute have been complied with as to the (customer's consent, search warrant or Judicial subpoena, formal written request, emergency access, as applicable) presented on (date), for the following financial records of (customer's name):

_____

(Describe the specific records)

(Official Signature Block) _____

Pursuant to section 3417(c) of the Right to Financial Privacy Act of 1978, good faith reliance upon this certificate relieves your institution and its employees and agents of any possible liability to the customer in connection with the disclosure of these financial records.

## APPENDIX D TO PART 504—FORMAL WRITTEN REQUEST FOR ACCESS—SAMPLE FORMAT

*(Official Letterhead)*

(Date)_____
Mr./Mrs._____,

*President (as appropriate), City National Bank and Trust Company, Altoona, FA 16602.*

Dear Mr./Mrs._____: In connection with a legitimate law enforcement inquiry and pursuant to section 3402(5) and section 3408 of the Right to Financial Privacy Act of 1978, section 3401 et seq., Title 12, United States Code, and Army Regulation 190-6, you are requested to provide the following account information pertaining to (identify customer) ;

_____
(Describe the specific records to be examined)

The Army has no authority to issue an administrative summons or subpoena for access to these financial records which are required for (describe the nature or purpose of the inquiry).

A copy of this request was (personally served upon or mailed to) the subject on (date) who has (10 or 14) days in which to challenge this request by filing an application in an appropriate United States district court if the subject desires to do so.

Upon expiration of the above mentioned time period and in the absence of any filing or challenge by the subject, you will be furnished a certification certifying in writing that the applicable provisions of the Act have been complied with prior to obtaining the requested records. Upon your receipt of a Certificate of Compliance with the Right to Financial

Privacy Act of 1978, you will be relieved of any possible liability to the subject in connection with the disclosure of the requested financial records. (Official Signature Block)

APPENDIX E TO PART 504—CUSTOMER NOTICE OF FORMAL WRITTEN REQUEST—SAMPLE FORMAT

*(Official Letterhead)*

(Date)_____
Mr./Ms._____
*1500 N. Main Street, Washington, DC 20314.*

Dear Mr./Ms._____: Information or records concerning your transactions held by the financial institution named in the attached request are being sought by the (agency/department) in accordance with the Right to Financial Privacy Act of 1979, section 3401 et seq., Title 12, United States Code, and Army Regulation 190-6; for the following purpose(s):

_____

(List the purpose(s))

If you desire that such records or information not be made available, you must do the following:

a. Fill out the accompanying motion paper and sworn statement or write one of your own–

(l) Stating that you are the customer whose records are being requested by the Government.

(2) Giving the reasons you believe that the records are not relevant or any other legal basis for objecting to the release of the records.

b. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:

_____

(List applicable courts)

c. Mail or deliver a copy of your motion and statement to the requesting authority: (give title and address).

d. Be prepared to come to court and present your position in further detail.

You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of (10 days from the date of personal service) (14 days from the date of mailing) of this notice, the records or information requested therein may be made available.

These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer if such transfer is made.

3 Inclosures (see papa------)

(Signature) _____

## APPENDIX P

**Army Regulation 190-6**

**Effective 15 February 1982**

**Military Police**

**Obtaining Information From Financial Institutions**

By Order of the Secretary of the Army:

E. C. MEYER
*General, United States Army*
*Chief of Staff*

Official:

ROBERT M. JOYCE
*Major General. United States Army*
*The Adjutant General*

**History**. This UPDATE issue is a reprint of the original form of this regulation that was published on 15 January 1982. Since that time no changes have been issued to amend the original. This publication has been reorganized to make it compatible with the Army electronic publishing database. No content has been changed.

**Summary**. This regulation implements DODD 5400.12, Obtaining Information from Financial Institutions, 6 February 1980; Change 1 to DODD 5400.12, 23 April 1981; and

Section 3401 et seq, Title 12, United States Code, Public Law 95-630, "Right to Financial Privacy Act of 1978." It sets forth policy for the Department of the Army to obtain information on a customer's financial records from a financial institution.

**Applicability**. See paragraph 1-2.

**Proponent and exception authority**. Not applicable.

**Army management control process**. Not applicable.

**Supplementation**. Supplementation of this regulation is permitted, but is not required. If supplements are issued, HQDA, agencies, and major Army commands will furnish one copy of each supplement to HQDA(DAPE-HRE-EM), WASH DC 20310; other commands will furnish one copy of each to the next higher headquarters.

**Interim changes**. Interim changes to this regulation are not official unless they are authenticated by The Adjutant General. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

**Suggested Improvements**. The proponent agency of this regulation is the Office of the Deputy Chief of Staff for Personnel. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) direct to HQDA (DAPE-HRE) WASH DC 20310.

**Distribution**. Active Army, A; ARNG, D; USAR, D.

## Chapter 1 General

### 1-1. Purpose

This regulation provides DA policies, procedures, and restrictions governing access to and disclosure of financial records maintained by financial institutions during the conduct of Army investigations or inquiries.

### 1-2. Applicability

a. This regulation applies to–

(1) All DA investigative activities conducted by the Active Army, the Army National Guard, and the US Army Reserve.

(2) Financial records maintained by financial institutions as defined in paragraph 1-3a.

b. The provisions of 12 U.S.C. 3401 et seq. do not govern obtaining access to financial records maintained by financial institutions located outside of the States or territories of the United States, Puerto Rico, the District of Columbia, Guam, American Samoa, or the Virgin Islands. The procedures outlined in paragraph 2-4d will be followed in seeking access to financial information from these facilities.

### 1-3. Explanation of terms

For purposes of this regulation, the following terms apply:

*a. Financial institution.* Any office of a–

(1) Bank.

(2) Savings bank.

(3) Credit card issuer as defined in Section 103 of the Consumers Credit Protection Act (1.5 U.S.C. 1602(n)).

(4) Industrial loan company.

(5) Trust company.

(6) Savings and loan association.

(7) Building and loan association.

(8) Homestead association (including cooperative banks).

(9) Credit union.

(10) Consumer finance institution.

This includes only those offices located in any State or territory of the United States, or in the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(11) Military banking contractors located outside the States or territories of the United States or the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

*b. Financial record.* An original record, its copy, or information known to have been derived from the original record held by a financial institution, pertaining to a customer's relationship with the financial institution.

*c. Person.* An individual or partnership of five or fewer individuals.

*d. Customer.* Any person or authorized representative of that person–

(1) Who used or is using any service of a financial institution.

(2) For whom a financial institution is acting or has acted as a fiduciary for an account maintained in the name of that person.

*e. Law enforcement inquiry.* A lawful investigation or official proceeding that inquires into a violation of, or failure to comply with, a criminal or civil statue or any enabling regulation, rule, or order issued pursuant thereto.

*f. Army law enforcement office.* Any Army element, agency, or unit authorized to conduct investigations under the Uniform Code of Military Justice or Army regulations. This broad definition of Army law enforcement office includes military police, criminal investigation, inspector general, and

military intelligence activities conducting investigations of violations of law or regulation.

*g. Personnel security investigation.* An investigation required to determine a person's eligibility for access to classified information, assignment or retention in sensitive duties, or other designated duties requiring such investigation. Personnel security investigation includes investigation of subversive affiliations, suitability information, or hostage situations conducted to make personnel security determinations. It also includes investigations of allegations that–

(1) Arise after adjudicative action, and

(2) Require resolution to determine a person's current eligibility for access to classified information or assignment or retention in a sensitive position. With DA, personnel security investigations are conducted by the Defense Investigative Service.

**1–4. Policy**

*a. Customer consent.* It is DA policy to seek customer consent to obtain a customer's financial records from a financial institution unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry. If the person declines to consent to disclosure, the alternative means of obtaining the records authorized by this regulation will be used; (See paras 2-4 through 2-7.)

*b. Access request.* Except as provided in c below and paragraphs. 1-6a, 2-7, and 2-10, Army investigative elements may not have access to or obtain copies of the information in the financial records of any customer from a financial institution unless the financial records are reasonably described and the–

(1) Customer has authorized such disclosure (para 2-2);

(2) Financial records are disclosed in response to a search warrant which meets the requirements of paragraph 2-4;

(3) Financial records are disclosed in response to a judicial subpoena which meets the requirements of paragraph 2-5; or

(4) Financial records are disclosed in response to a formal written request which meets the requirements of paragraph 2-6.

*c. Voluntary information.* Nothing in this regulation will preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying an Army investigative element that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation.

**1-5. Authority**

a. Law enforcement offices are authorized to obtain records of financial institutions per this regulation, except as provided in paragraph 2-5.

b. The head of a law enforcement office, of field grade rank or higher (or an equivalent grade civilian official), is authorized to initiate requests for such records.

**1-6. Exceptions and waivers**

a. A law enforcement office may issue a formal written request for basic identifying account information to a financial institution as part of a legitimate law enforcement inquiry. The request may be issued for any or all of the following identifying data:

(1) Name.

(2) Address.

(3) Account number.

(4) Type of account of any customer or ascertainable group of customers associated with a financial transaction or class or financial transactions.

b. A request for disclosure of the above specified basic identifying data on a customer's account may be issued without complying with the customer notice, challenge, or transfer procedures described in chapter 2. However, if access to the financial records themselves is required, the procedures in chapter 2 must be followed. (A sample format for requesting basic identifying account data is in app A).

c. No exceptions or waivers will be granted for those portions of this regulation required by law. Submit requests for exceptions for waivers of other aspects of this regulation to HQDA (DAPE-HRE), WASH DC 20310.

**Chapter 2 Procedures**

**2-1. General**

A law enforcement official seeking access to a person's financial records will, when feasible, obtain the customer's consent. This chapter also sets forth other authorized procedures for obtaining financial records if it is not feasible to obtain the customer's consent. Authorized procedures for obtaining financial records follow. All communications with a US Attorney or a US District Court, as required by this regulation, will be coordinated with the supporting staff judge advocate before dispatch.

**2-2. Customer consent**

a. A law enforcement office or personnel security element may gain access to or a copy of a customer's financial records by obtaining the customer's consent and authorization in writing. (See app B for a sample format.) Any consent obtained under the provisions of this paragraph must–

(1) Be in writing, signed, and dated.

(2) Identify the particular financial records being disclosed.

(3) State that the customer may revoke the consent at any time before disclosure.

(4) Specify the purpose of disclosure and to which agency the records may be disclosed.

(5) Authorize the disclosure for a period not over 3 months.

(6) Contain a "Statement of Customer Rights Under the Right to Financial Privacy Act of 1978" (app B).

b. Any customer's consent not containing all of the elements listed in a above will not be valid.

c. A copy of the customer's consent will be made a part of the law enforcement inquiry file.

d. A certification of compliance with 12 U.S.C. 3401 et seq (app C), along with the customer's consent, will be provided to the financial institution as a prerequisite to obtaining access to the financial records.

e. The annual reporting requirements of paragraph 2-13 apply to requests made to a financial institution even with the customer's consent.

**2-3. Administrative summons or subpoena**

The Army has no authority to issue an administrative summons or subpoena for access to financial records.

**2-4. Search warrant**

a. A law enforcement office may obtain financial records by using a search warrant obtained under Rule 41 of the Federal Rules of Criminal Procedure in appropriate cases.

b. No later than 90 days after the search warrant is served, unless a delay of notice is obtained under paragraph 2-9, a copy of the search warrant and the following notice must be mailed to the customer's last known address:

"Records or information concerning your transaction held by the financial institution named in the attached search warrant were obtained by this (office/agency/unit) on (date) for the following purpose: (state purpose). You may have rights under the Right to Financial Privacy Act of 1978."

c. Search authorizations signed by installation commanders or military judges will not be used to gain access to financial records from financial institutions in any State or territory of the United States.

d. Access to financial records maintained by military banking contractors in oversea areas or by other financial institutions located on DOD installations outside the United States, Puerto Rico, The District of Columbia, Guam, American Samoa, or the Virgin Islands is preferably obtained by customer consent.

(1) In cases where it would not be appropriate to obtain this consent or such consent is refused and the financial institution is not otherwise willing to provide access to its records, the law enforcement activity may seek access by use of a search authorization. This authorization must be prepared and issued per AR 27-10.

(2) Information obtained under this paragraph should be properly identified as financial information. It should be transferred only where an official need-to-know exists. Failure to do so, however, does not render the information inadmissible in courts-martial or other proceedings.

(3) Law enforcement activities seeking access to financial records maintained by all other financial institutions overseas will comply with local foreign statutes or procedures governing such access.

**2-5. Judicial subpoena**

Judicial subpoena–

a. Are those subpoenas issued in connection with a pending judicial proceeding.

b. Include subpoenas issued under paragraph 115 of the Manual for Courts-Martial and Article 46 of the Uniform Code of Military Justice. The servicing staff judge advocate will be consulted on the availability and use of judicial subpoenas. The notice and challenge provisions of 12 USC 3407 and 3410 will be followed.

**2-6. Formal written request**

a. A law enforcement office may formally request financial records when the records are relevant to a legitimate law enforcement inquiry. This request may be issued only if–

(1) The customer has declined to consent to the disclosure of his or her records, or

(2) Seeking consent from the customer would compromise or harmfully delay a legitimate law enforcement inquiry.

b. A formal written request will be a format set forth in appendix D and will–

(1) State that the request is issued under the Right to Financial Privacy Act of 1978 and this regulation.

(2) Describe the specific records to be examined.

(3) State that access is sought in connection with a legitimate law enforcement inquiry.

(4) Describe the nature of the inquiry.

(5) Be signed by the head of the law enforcement office or a designee (persons specified in para 1-5b).

c. At the same time or before a formal written request is issued to a financial institution, a copy of the request will be personally served upon or mailed to the customer's last known address unless a delay of customer notice has been

obtained under paragraph 2-9. The notice to the customer will be–

(1) In a format similar to appendix E.

(2) Personally served at least 14 days or mailed at least 18 days before the date on which access is sought.

d. The official who signs the customer notice is designated to receive any challenge from the customer.

e. The customer will have 14 days to challenge a notice request when personal service is made, and 18 days when service is by mail.

f. The head of the law enforcement office initiating the formal written request will set up procedures to insure that no access to financial records is attempted before expiration of the above time : periods–

(1) While awaiting receipt of a potential customer challenge, or

(2) While awaiting the filing of an application for an injunction by the customer.

g. Proper preparation of the formal written request and notice to the customer requires preparation of motion papers and a statement suitable for court filing by the customer. Accordingly, the law enforcement office intending to initiate a formal written request will coordinate preparation of the request, the notice, motion papers, and sworn statement with the supporting staff judge advocate. These documents are required by statute, their preparation cannot be waived.

h. The supporting staff judge advocate is responsible for liaison with the proper United States Attorney and United States District Court. The requesting official will coordinate with the supporting staff judge advocate to determine whether the customer, has filed a motion to prevent disclosure of the financial records within the prescribed time limits.

i. The head of the law enforcement office (pars 2-6b(5)) will certify in writing (see app C) to the financial institution

that such office has complied with the requirements of 12 U.S.C. 3401 et seq–

(1) When a customer fails to file a challenge to access to financial records within the above time periods, or

(2) When a challenge is adjudicated in favor of the law enforcement office.

No access to any financial records will be made before such certification is given.

**2-7. Emergency access**

a. In some cases, the requesting law enforcement office may determine that a delay in obtaining access would create an imminent danger of–

(1) Physical injury to a person,

(2) Serious property damage, or

(3) Flight to avoid prosecution.

Paragraphs b and c below provide for emergency access in such cases of imminent danger. (No other procedures in this regulation apply to such emergency access.)

b. When emergency access is made to financial records, the requesting Official (para 1-5) will–

(1) Certify in writing (in a format similar to that in app C) to the financial institution that the provisions of 12 U.S.C. 3401 et seq. have been complied with as prerequisite to obtaining access.

(2) File with the proper court a signed, sworn statement setting forth the grounds for the emergency access within 5 days of obtaining access to financial records.

c. After filing of the signed, sworn statement, the official who has obtained access to financial records under this paragraph will-

(l) Personally serve or mail to the customer a copy of the request to the financial institution and the following notice,

unless a delay of notice has been obtained under paragraph 2-9:

> "Records concerning your transactions held by the financial institution named in the attached request were obtained by (office/agency/ unit) under the Right to Financial Privacy Act of 1978 on (date) for the following purpose: (state with reasonable detail the nature of the law enforcement inquiry). Emergency access to such records was obtained on the grounds that (state grounds)."

(2) Insure that mailings under this paragraph will be by certified or registered mail to the last known address of the customer.

d. The annual reporting requirements of paragraph 2-13 apply to any request for access under this paragraph.

**2-8. Release of Information obtained from financial Institutions**

*a. Records notice.* Financial records, to include derived information, obtained under 12 U.S.C. 3401 et seq. will be marked as follows:

> "This record was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C., 3401 et seq., and may not be transferred to another Federal agency or department outside DOD without prior compliance with the transferring requirements of 12 U.S.C. 3412."

*b. Records transfer.*

(1) Financial records originally obtained under this regulation will not be transferred to another agency or

department outside the DOD unless the transferring law enforcement office certifies the relevance in writing. Certification will state that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency or department. To support this certification, the transferring office may require that the requesting agency submit adequate justification for its request. File a copy of this certification with a copy of the released records.

(2) Unless a delay of customer notice has been obtained (pars 2-9), the transferring law enforcement office will, within 14 days, personally serve or mail the following to the customer at his or her last known address:

*(a)* A copy of the certification made according to (1) above.

(b) The following notice, which will state the nature of the law enforcement inquiry with reasonable detail:

> "Copies of, or information contained in, your financial records lawfully in possession of the Department of the Army have been furnished to (state the receiving agency or department) pursuant to the Right to Financial Privacy Act of 1978 for (state the purpose). If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Financial Privacy Act of 1978 or the Privacy Act of 1974."

(3) If a request for release of information is from a Federal agency authorized to conduct foreign intelligence or foreign counterintelligence activities (Executive Order 12036) and is for purposes of conducting such activities by these agencies, the information will be released without notifying the customer, unless permission to provide notification is given in writing by the requesting agency.

(4) Financial information obtained before the effective date of the Financial Privacy Act of 1978 (10 March 1978) may continue to be provided to other agencies according to existing procedures, to include applicable Privacy Act System Notices published in AR 340–21 series.

*c. Precautionary measures.* Whenever financial data obtained under this regulation are incorporated into a report of investigation or other correspondences, precautions must be taken to insure that–

(1) The report or correspondence is not distributed outside of DOD except in compliance with b above.

(2) The report or other correspondence contains the following warning restriction on the first page or cover:

> "Some of the information contained herein (cite specific paragraphs) is financial record information which was obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 et seq. This information may not be released to another Federal agency or department outside the DOD without compliance with the specific requirements of 12 U.S.C. 3412 and AR 190–6."

**2-9. Delay of customer notice procedures**

*a. Length of delay.* The customer notice required by formal written request (para 2-6c), emergency access (para 2-7c), and release of information (para 2-8b)(2)) may be delayed for successive periods of 90 days. The notice required for search warrant (pars 2-4b) may be delayed for one period of 180 days and successive periods of 90 days.

*b. Conditions for delay.* A delay of notice may be granted only by a court of competent jurisdiction. This will be done when not granting a delay in serving the notice would result in–

(1) Endangering the life or physical safety of any person.

(2) Flight from prosecution.

(3) Destruct/on of or tampering with evidence.

(4) Intimidation of potential witnesses.

(5) Otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same degree as the circumstances in (1) through (4) above.

*c. Coordination.* When a delay of notice is appropriate, the law enforcement office involved will consult with the supporting staff judge advocate to obtain such a delay. Applications for delay of notice should contain reasonable detail.

*d. After delay expiration.* Upon the expiration of a delay of notice under a above and required by–

(1) Paragraph 2-4b, the law enforcement office obtaining financial records will mail to the customer a copy of the search warrant and the following notice:

> "Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by this (agency or office) on (date). Notification was delayed beyond the statutory 90-day delay period pursuant to a determination by the court that such notice would seriously jeopardize an investigation concerning (state with reasonable detail). You may have rights under the Right to Financial Privacy Act of 1978."

(2) Paragraph 2-6c, the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the process or request and the following notice:

"Records or information concerning your transactions which are held by the financial institution named in the attached process or request were supplied to or requested by the Government authority named in the process or request on (date). Notification was withheld pursuant to a determination by the (title of the court so ordering) under the Right to Financial Privacy Act of 1978 that such notice might (state reason.) The purpose of the investigation or official proceeding was (state purpose with reasonable detail)."

(3) Paragraph 2-7c, the law enforcement office obtaining financial records will serve personally or mail to the customer a copy of the request and the notice required by paragraph 2-7c.

(4) Paragraph 2-8b, the law enforcement office transferring financial records will serve personally or mail to the customer the notice required by paragraph 2-8b(2). If the law enforcement office was responsible for obtaining the court order authorizing the delay, such office shall also serve personally or by mail to the customer the notice required in paragraph 2-6c.

*e. Annual report. The* annual reporting requirements of paragraph 2-13 apply to delays of notice sought or granted under this paragraph.

**2-10. Foreign Intelligence and foreign counterintelligence activities**

a. Except as indicated below, nothing in this regulation applied to requests for financial information in connection with authorized foreign intelligence and foreign counterintelligence activities as defined in Executive Order 12036. Appropriate foreign intelligence and counterintelligence directives should be consulted in these instances.

b. However, to comply with the Financial Privacy Act of 1978, the following guidance will be followed for such requests. When a request for financial records is made–

(1) A military intelligence group commander, the chief of an investigative control office, or the Commanding General (CG) (or Deputy CO), US Army Intelligence and Security Command will certify to the financial institution that the requesting activity has complied with the provisions of 12 U.S.C. 3403(b).

(2) The requesting office will notify the financial institution from which records are sought that 12 U.S.C. 3414(a)(3) prohibits disclosure to any person by the institution, its agents, or employees that financial records have been sought or obtained.

c. The annual reporting requirements shown in paragraph 2-13 apply to any request for access under this paragraph.

**2-11. Certification**

A certificate of compliance with the Right to Financial Privacy Act of 1978 (app C) will be provided to the financial institution as a prerequisite to obtaining a customers financial records under the following access procedures:

a. Customer consent (para 2-2).

b. Search warrant (para 2-4).

c. Judicial subpoena (para 2-5).

d. Formal written request (para 2-6).

e. Emergency access (para 2-7).

f. Foreign intelligence and foreign counterintelligence activities (para 2-10).

**2-12. Penalties**

Obtaining or disclosing financial records or financial information on a customer from a financial institution in

violation of the act or this regulation may subject the Army to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the act or this regulation may be subject to disciplinary action.

**2-13. Right to Financial Privacy Act of 1978 Annual Report (RCS DD-COMP(A) 1538)**

a. Major Army commanders will submit this report to HQDA (DAPE-HRE) concerning requests for financial information from financial institutions. Reports are to include all queries requested or information obtained under the provisions of this regulation by subordinate Army law enforcement offices (as defined in para 1-3*f*). Negative reports will be submitted.

b. This report is to arrive at HQDA(DAPE-HRE), WASH DC 20310, not later than 1 February following the calendar year period.

c. The annual report will contain the number of–

(1) Requests for access to financial institutions, specifying the types of access and any other information deemed relevant or useful.

(2) Customer challenges to access and whether they were successful.

(3) Transfers to agencies outside of the DOD of information obtained under this regulation.

(4) Customer challenges to the transfer of information and whether they were successful.

(5) Applications for delay of notice, the number granted, and the names of the officials requesting such delays.

(6) Delay of notice extensions sought and the number granted.

(7) Refusals by financial institutions to grant access, by category of authorization, such as customer consent or formal written request.

d. A consolidated Army report will be submitted by HQDA (DAPE-HRE) to the Defence Privacy Board, Office of the Deputy Assistant Secretary of Defense (Administration), by 15 February each year.

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No. 06-819

# In the Supreme Court of the United States

MARSHALL KENNETH FLOWERS AND ANNA FLOWERS,
PETITIONERS

*v.*

UNITED STATES ARMY, 25TH INFANTRY DIVISION,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

This suit alleged that the Army's investigation of then-Sergeant Major Marshall Flowers for larceny was the product of a conspiracy among his superior officers to press false charges against him. As relevant here, the complaint alleged that subpoenas for bank records that the Army issued in connection with the larceny investigation were a product of the alleged conspiracy and thus constituted a willful violation of the Right to Financial Privacy Act of 1978.

The question presented is whether the court of appeals correctly dismissed petitioners' claims in reliance on *Feres* v. *United States*, 340 U.S. 135 (1950), because those claims are for injuries arising out of military service.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is not published in the *Federal Reporter* but is reprinted in 179 Fed. Appx. 986. The opinions of the district court (Pet. App. 81a-97a, 59a-80a) are reported at 289 F. Supp. 2d 1213 and 295 F. Supp. 2d 1130.

## JURISDICTION

The judgment of the court of appeals was entered on May 3, 2006. A petition for rehearing was denied on September 14, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This action arises out of disciplinary proceedings brought by the United States Army against petitioner Marshall Flowers, then a Sergeant Major in the Army. After the Army determined that Flowers had committed larceny, it barred him from re-enlisting in the Army when his term of service expired. In connection with the larceny investigation, the Army issued subpoenas for petitioners' bank records. Pet. App. 63a-64a. As relevant here, the complaint alleged that the subpoenas were issued as part of an Army conspiracy to press false charges against Marshall Flowers, and thus constituted a willful violation of the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 *et seq.* The district court held that the claim was barred under *Feres* v. *United States*, 340 U.S. 135 (1950), because it would require the court to investigate the motives of Marshall Flowers' superior officers for conducting the disciplinary proceedings. The court of appeals affirmed. Pet. App. 2a-7a.

1. The factual background is described at length by the district court. See Pet. App. 61a-69a. In December 1997, the Army arrested then-Sergeant Major Marshall Flowers for shoplifting at a military exchange at Schofield Barracks, Hawaii. See *id.* at 63a; C.A. App. Tab 61; Tab 77 at 34; Tab 79 at 4. Footage from video surveillance cameras showed Marshall Flowers taking a television and a hard drive without payment on separate occasions in December 1997. See C.A. App. Tab 60; Tab 61; Tab 77 at 34; Tab 79 at 4. Marshall Flowers was already under investigation at the time because he had on multiple occasions returned duplicate items to Army and Navy exchanges, often without receipts, in exchange

for cash. See Pet. App. 63a; C.A. App. Tab 77 at 37, 51; Tab 78; Tab 80 at 2.

From December 1997 until March 1998, a military Criminal Investigation Division (CID) investigated the conduct of Marshall Flowers and his wife, Anna Flowers. See Pet. App. 63a. During a search of petitioners' residence, the CID found numerous duplicate and unopened electronic, computer, and other high-value items. *Ibid.*; see C.A. App. Tab 77 at 48-49; Tab 80 at 3-7. The CID investigation report determined that there was probable cause to believe that petitioners conspired to steal more than $27,000 worth of merchandise from Army and Navy exchanges. See C.A. App. Tab 80 at 1.

In April 1998, the Army charged Marshall Flowers with 42 counts of larceny under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.* Pet. App. 63a-64a; C.A. App. Tab 81. Ultimately, the Army and Marshall Flowers reached an agreement under which he would retire from the Army and accept non-judicial punishment pursuant to Article 15 of the UCMJ, 10 U.S.C. 815, in lieu of a general court-martial. See Pet. App. 66a; C.A. App. Tab 93, Enclosure 9. A hearing was held pursuant to Article 15, and Marshall Flowers was found to have committed larceny in violation of Article 121 of the UCMJ, 10 U.S.C. 921. See Pet. App. 67a. Marshall Flowers received a formal written reprimand and was required to forfeit approximately $3500. See *ibid.* His appeal was denied. See *id.* at 69a.

Marshall Flowers' term of enlistment was set to expire on May 13, 1999. See Pet. App. 68a; C.A. App. Tab 94. In April 1999, his supervisor recommended a formal bar to re-enlistment in light of the findings in the Article 15 proceeding that Marshall Flowers had com-

mitted larceny. The bar was approved by General James T. Hill. See Pet. App. 68a-69a.

In the course of the larceny investigation, the Army issued subpoenas for petitioners' bank records. Pet. App. 64a; see C.A. App. Tab 87 (subpoena to First Hawaiian Bank); Fort Jackson Federal Credit Union (F.J.) Supp. E.R. 1, Juliano Decl. Exh. B (subpoena to Fort Jackson Federal Credit Union). The court of appeals later determined that the Army lacked subpoena power at that stage of the disciplinary proceedings. See 295 F.3d 966 (9th Cir. 2002). The bank records were not used in the disciplinary proceedings and played no role in the decision to impose the bar to re-enlistment. Pet. App. 65a-66a; see C.A. App. Tab 77 at 72-74, 92-100; Tab 76 at 79, 86.

2. Petitioners filed the present actions under the RFPA. See Pet. App. 61a-62a. Their Second Amended Consolidated Complaint, which was filed through counsel and is the operative complaint for purposes of this appeal, named as defendants the United States Department of the Army; the Secretary of the Army in his official capacity; Major John Ohlweiler; and the two financial institutions that had received Army subpoenas (respondents First Hawaiian Bank and Fort Jackson Federal Credit Union). *Id.* at 6a; see C.A. App. Tab 96; Tab 41; Tab 69. The premise of the complaint was that Marshall Flowers' superior officers conspired to press false larceny charges against him, and that the disciplinary proceedings were themselves "fraudulent." C.A. App. Tab 96, paras. 8-11. The complaint sought punitive damages for allegedly willful and malicious violations of the RFPA. The complaint also alleged violations of petitioners' constitutional right to privacy, as well as various

tort claims arising out of the same disciplinary proceedings.[1]

The district court dismissed the claims against the federal defendants. Pet. App. 81a-97a. The court held that all of the claims were barred under the *Feres* doctrine, which immunizes the United States and members of the military from suits that may "intrude in military affairs, second-guess military decisions, or impair military discipline." *Id.* at 88a (quoting *Zaputil* v. *Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003). The court surveyed a number of contexts in which the principle of *Feres* has been applied to bar suits, including under the Tort Claims Act (FTCA) in *Feres* itself and under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See Pet. App. 85a, 86a. The court explained that in this case it likewise could not assess petitioners' contention that the Army willfully violated the RFPA without examining the nature of the Army's disciplinary investigation, the need for the Article 32 proceeding, and the motives and state-of-mind of the investigating authorities in issuing the subpoenas—precisely the type of inquiry foreclosed under *Feres*. See Pet. App. 88a-89a. The court further observed that petitioners' pending discovery requests—seeking to depose a four-star general and other senior military officials regarding the reasons for the Article 32 proceeding—underscored the intrusion into military affairs and military discipline. See *id.* at 89a-90a.[2]

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[1] The United States was substituted for Major Ohlweiler as defendant on petitioners' tort claims, pursuant to 28 U.S.C. 2679(d)(1). See C.A. App. Tab 66.

[2] In a subsequent opinion, the district court entered summary judgment for defendant Fort Jackson Federal Credit Union, and partial summary judgment for defendant First Hawaiian Bank. See Pet. App.

3. A unanimous panel of the Ninth Circuit affirmed in an unpublished, per curiam opinion. Pet. App. 2a-7a. The court held that the claims against the federal defendants were properly dismissed under *Feres* because their adjudication "would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States." *Id.* at 4a. The court explained that the claims thus "implicate the concerns that lie at the heart of the *Feres* doctrine." *Ibid.*[3]

**ARGUMENT**

The unpublished decision of the court of appeals is correct and does not conflict with a decision of another court of appeals. The petition for a writ of certiorari should be denied.

1. In *Feres* v. *United States*, *supra*, this Court held that "service members cannot bring tort suits against the Government for injuries that 'arise out of or are in the course of activity incident to service.'" *United States* v. *Johnson*, 481 U.S. 681, 686 (1987) (quoting *Feres*, 340 U.S. at 146). As this Court has explained, such suits "would involve the judiciary in sensitive military affairs at the expense of military discipline

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59a-80a. The court awarded petitioners $200 in statutory damages against First Hawaiian Bank in light of the determination of the court of appeals that an RFPA violation had occurred, see *id.* at 78a-79a, as well as costs and fees, see *id.* at 9a-14a.

[3] The court of appeals affirmed the district court's ruling on the bank defendants' motion for summary judgment, finding that petitioners' arguments were unsupported by the record. Pet. App. 5a-6a. The court rejected various procedural objections raised by petitioners, including an objection to the government's failure to serve petitioners with letters informing the clerk's office of the dates on which government counsel would be unavailable to present oral argument. *Id.* at 7a.

and effectiveness." *Id.* at 690 (internal quotation marks and citation omitted).

In *Feres* itself, the Court held that members of the military were barred from bringing suit under the FTCA. In *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and *United States* v. *Stanley*, 483 U.S. 669 (1987), the Court held that *Feres* bars *Bivens*, *supra*, actions against individual officials as well. In *Johnson*, the Court held that *Feres* bars an FTCA claim for service-related injuries even though the suit challenged the conduct of civilian rather than military officials. This Court observed that such suits "have the potential to disrupt military discipline in the broadest sense of the word." 481 U.S. at 691.

The RFPA was enacted in 1978, against the backdrop of the Court's decision in *Feres*. The RFPA therefore is properly construed to incorporate the same limitation on damages actions sounding in tort that arise out of military service, especially where, as in this case, the suit challenges the institution and conduct of disciplinary proceedings. Cf. *Hartman* v. *Moore*, 547 U.S. 250 (2006) (discussing special difficulties with retaliatory prosecution claims even in civilian context).

Indeed, as the court of appeals held, petitioners' claim for willful violation of the RFPA implicates the concerns for military discipline "that lie at the heart of the *Feres* doctrine." Pet. App. 4a. The premise of the complaint was that the disciplinary proceedings and the subpoenas issued pursuant to those proceedings were the product of a conspiracy by high-ranking Army officials to press false larceny charges against then Sergeant Major Flowers. See, *e.g.*, C.A. App. Tab 96, para. 8 ("The agents' fraudulent conduct and obstruction of justice, led them to conspire to create a crime and

charge Plaintiff with a violation of the Uniform Code of Military Justice."); see also Pet. 3-4 ("Through altering of evidence and improper influenced [*sic*], * * * Captain John Ohlweiler * * * had Capt. Joseph Hall * * * prefer charges against SGM Flowers that alleged violation of Article 121 (Larceny)."). Petitioners thus insisted that they be allowed to depose a four-star general and other high-ranking Army officials in Marshall Flowers' chain of command in the hope of developing evidence of an improper motive for their actions. See Pet. App. 89a-90a; see also Pet. 26 (arguing that "the district court unreasonably restricted access to discovery that prohibited the depositions of federal defendant and witnesses, particularly, Capt. John Ohlweiler and former 25th Infantry Division Commander, General James Hill"). As the court of appeals explained, the district court could not adjudicate that claim without conducting precisely the type of inquiry into military disciplinary proceedings that the *Feres* doctrine is intended to prevent. Pet. App. 4a.

2. The decision of the court of appeals is unpublished, and thus does not constitute binding precedent within the Ninth Circuit. See 9th Cir. R. 36-1. Moreover, contrary to petitioners' contention (Pet. 20-25), the decision below does not conflict with a decision of any other court of appeals. The decision was based on the specific facts of this case, that is, the allegation that Army officials had willfully violated the RFPA as part of a military conspiracy to press false disciplinary charges against Marshall Flowers. The court of appeals decisions that petitioners cite, *Duncan* v. *Belcher*, 813 F.2d 1335 (4th Cir. 1987), and *Cummings* v. *Department of the Navy*, 279 F.3d 1051 (D.C. Cir. 2002), did not present similar factual scenarios and are otherwise distinguish-

able. Most notably, neither case involved a challenge to subpoenas issued during a military disciplinary proceeding based on the subjective intent of the military officers involved. In addition, *Cummings* involved the Privacy Act, not the RFPA, and the court's decision rejecting the application of *Feres* in that case turned on specific statutory language in the Privacy Act, not present in the RFPA, that contemplated the particular application of the Act to the military in the manner at issue in that case. *Duncan* did involve a claim under the RFPA, but the court did not address application of *Feres* (although the Army had urged unsuccessfully that the RFPA should not be applied in a manner that would interfere with military discipline or law enforcement generally, see 813 F.3d at 1339). Rather, the issue on appeal, and the focus of the court's opinion, was whether an individual was a "customer" of a financial institution where the individual had obtained a credit card under his personal name but used the card primarily to charge business expenses. The district court had determined that because the individual service member had used the card primarily to charge business travel expenses, the business (in that case an apparent civilian company that covertly provided security and counterintelligence support to United States Army special operations around the world), and not the individual, was the "customer" for purposes of the RFPA. The court of appeals reversed, holding that the individual card holder was a "customer" entitled to protection under the RFPA, regardless of the use of the card for business expenses. That unremarkable holding does not conflict with the court of appeals' application of *Feres* to the markedly different facts of this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
# Supreme Court of the United States

MARSHALL K. FLOWERS and ANNA FLOWERS,

*Petitioners,*

v.

UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHLWEILER, Captain,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT FIRST HAWAIIAN BANK'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED AS TO FIRST HAWAIIAN BANK

1. Whether it was proper for the district court to bar re-deposition of Army personnel upon a finding that such testimony would be irrelevant to any of the remaining claims against Respondent First Hawaiian Bank;

2. Whether Petitioners Marshall K. Flowers and Anna Flowers' motion to stay summary judgment pursuant to FRCP Rule 56(f) was properly denied where there had been ample time for discovery, and there had been no showing that further discovery could lead to a different conclusion; and

3. Whether summary judgment on the issue of damages was properly granted in favor of First Hawaiian Bank.

## RULE 29.6 STATEMENT

First Hawaiian Bank's parent corporation is BancWest Corporation, a Delaware Corporation owning 100% of First Hawaiian Bank stock. BancWest Corporation is wholly owned by BNP Paribas, a foreign corporation.

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## BRIEF IN OPPOSITION

Respondent First Hawaiian Bank (hereinafter "First Hawaiian") respectfully submits this brief in opposition to the petition for a writ of certiorari.

## OPINIONS AND ORDERS BELOW

### A. The Instant Appeal

The court of appeals' order denying petition for panel rehearing and petition for rehearing *en banc* and memorandum opinion are unreported. Pet. App. 1a, 2a-7a. The district court's order reversing discovery order allowing redeposition of Army personnel is reported at 289 F.Supp.2d 1213 (D. Haw. 2003). Pet. App. 81a-97a. The district court's order granting First Hawaiian summary judgment and denying FRCP Rule 56(f) continuance is reported at 295 F. Supp.2d 1130 (D. Haw. 2003). Pet. App. 59a-80a.

### B. Prior Appeal

The district court's order granting First Hawaiian judgment on the pleadings is reported at 85 F.Supp.2d 993 (D. Haw. 2000). CR[99-335] 33.[1] The court of appeals' opinion reversing First Hawaiian's judgment on the pleadings and remanding the case is reported at 295 F.3d 966 (9th Cir. 2002).

[1] References to the docket in Civil No. 99-335 are referred to as "CR[99-335]" followed by the docket number assigned to it.

## JURISDICTION

Petitioners Marshall K. Flowers and Anna Flowers (hereinafter collectively "Petitioners") invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). First Hawaiian does not dispute the jurisdiction of this Court.

## STATUTORY PROVISION INVOLVED

The Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* (hereinafter "RFPA"), provides in relevant part:

> **§ 3417 Civil Penalties**
>
> **(a) Liability of agencies or departments of the United States or financial institutions.** Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this title is liable to the customer to whom such records relate in an amount equal to the sum of –
>
> (1) $100 without regard to the volume of records involved;
>
> (2) any actual damages sustained by the customer as a result of the disclosure;
>
> (3) such punitive damages as the court may allow, where the violation has been willful or intentional; and
>
> (4) in the case of any successful action to enforce liability under this section, the cost of the action together with reasonable attorney's fees as determined by the court.
>
> * * *

> **(d) Exclusive judicial remedies and sanctions.** The remedies and sanctions described in this title shall be the only authorized judicial remedies and sanctions for violations of this title.

12 U.S.C. § 3417.

## STATEMENT

The unpublished decision below is entirely fact-bound as to First Hawaiian. The court of appeals affirmed summary judgment in favor of First Hawaiian based on the complete lack of evidence in the record to support the Petitioners' claim for damages. The decision as to First Hawaiian does not conflict with any decision of this Court, another court of appeals, or a state high court. The decision also does not present an important question as to First Hawaiian that warrants this Court's review. Lastly, the unpublished decision cannot be cited as binding precedent under the Rules of the Ninth Circuit Court of Appeals. *See* 9th Cir. R. 36-3. The petition should be denied.

The facts pertinent to First Hawaiian are as follows. On October 22, 2003, First Hawaiian filed its motion for summary judgment as to all claims for compensatory[2] damages. CR 371.[3] On that same date, First Hawaiian filed its substantive joinder to Respondent Fort Jackson Federal Credit Union's ("FJFCU") motion for partial

[2] Referred to as "actual" damages in the RFPA. 12 U.S.C. § 3417(a)(2).

[3] References to the docket in Civil No. 01-412 are referred to as "CR" followed by the docket number assigned therein.

summary judgment regarding the Petitioners' claims for punitive damages.[4] CR 368. Previously, on April 9, 2003, First Hawaiian admitted to committing a violation of the RFPA leaving only the issue of damages in dispute. CR 217.

On November 13, 2003, Petitioners filed a motion to stay First Hawaiian's and FJFCU's motions for summary judgment pursuant to FRCP Rule 56(f). CR 404. The motion did not meet the requirements of Rule 56(f) insofar as it did not state what specific facts Petitioners hoped to discover and how it would preclude summary judgment. CR 404.

On December 5, 2003, the district court entered its order denying the Rule 56(f) request and granting summary judgment in favor of First Hawaiian as to the claims for actual and punitive damages based on the lack of any evidence to support the claims, and the Petitioners' failure to show any possibility of such evidence. Pet. App. 59a-80a. In its order, the district court succinctly set forth a summary of the procedural history and facts of this matter. The following are the portions of the district court's summary pertinent to First Hawaiian:

> Plaintiff Marshall Flowers brought these suits primarily under the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* ("RFPA"), after Defendants First Hawaiian Bank and Fort Jackson Federal Credit Union provided bank records to the United States Army after receiving military subpoenas during Article 32 investigatory

[4] First Hawaiian and FJFCU also filed other motions for summary judgment and substantive joinders on this same date which are not at issue in the petition and therefore not discussed herein.

proceedings against then-Sergeant-Major Flowers. This Court dismissed the suit against First Hawaiian Bank, but the Ninth Circuit remanded to this Court after determining that an Article 32 subpoena was invalid and that litigation and grand jury exemptions under 12 U.S.C. §§ 3413(e) and 3413(i) did not apply. *See Flowers*, 295 F.3d at 970-77.

After remand, this Court consolidated the First Hawaiian Bank matter (Civ. No. 99-00335) with a similar matter involving Fort Jackson FCU (Civ. No. 01-412). Fort Jackson FCU consented to personal jurisdiction in Hawaii and the cases were consolidated upon Fort Jackson's motion to consolidate.

* * *

The Army's underlying Article 32 proceedings are collateral to the RFPA claims at issue in this case. The Court's role here is not to resolve or even to address the validity of the past larceny charges against Marshall Flowers. It has become apparent, however, that those charges and proceedings, although collateral, are nevertheless relevant to the primary remaining issues (causation and damages) in this suit. Plaintiffs and Defendants have provided much of the evidence or procedural history of those military proceedings as part of this RFPA case. Marshall Flowers spends much effort discussing those allegations and attempting to refute some of the evidence. He contends that the Bank Defendants' financial disclosures – not the underlying military proceedings – caused him damages, to wit, his leaving the Army two years short of his goal of 30 years of service. The Court therefore sets forth some of the relevant background of the charges

and the underlying procedural history as necessary to explain why the financial disclosures, even if either Bank Defendant violated the terms of the RFPA, nevertheless are not responsible for Plaintiffs' alleged damages.

The evidence in the record provides, among other things, as follows:[1]

In December of 1997, SGM Marshall Flowers was apprehended for alleged shoplifting at the military Post Exchange at Schofield Barracks, Hawaii, after he was observed apparently shoplifting on a security video.

Prior to December of 1997, the Army had been investigating Flowers because he had returned duplicate items on multiple occasions to Army and Navy Exchanges, often without receipts, in exchange for cash. From December 1997 until March 1998, a military Criminal Investigation Division ("CID") investigated the conduct of both Marshall and Anna Flowers. The evidence obtained by the CID appears to be substantial, although there apparently is or was some question about some of its admissibility in a subsequent criminal trial. Among other evidence, a search of his residence found numerous duplicate and unopened electronic, computer, and other high-value items. Also found were multiple refund receipts and what is described as "homemade" refund receipts on his computer.

In April of 1998, the Army filed 42 charges of larceny against Flowers. An Article 32 investigation

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[1] Although Plaintiffs attempt to dispute some of the details, the evidence is uncontradicted in any pertinent part. Any disputes of fact are not material to the issues now before the court.

was begun but proceedings were postponed at the request of defense counsel until June of 1998.

On June 19, 1998, a DD Form 453 subpoena was issued by the United States Army to First Hawaiian Bank requesting "all bank records, # 25478010, to include all deposits and withdrawals." This account belonged to Marshall and Anna Flowers. It stated that it was issued for an "Article 32 hearing" and cites Section 847 of the Uniform Code of Military Justice regarding punishment for failure to comply with the subpoena, as well as a "Manual for Courts-Martial R.C.M. 703(e)(2)(G)."

First Hawaiian Bank notified Marshall Flowers of the subpoena by letter dated July 1, 1998, although it did not do so pursuant to the RFPA nor did it otherwise comply with the RFPA. The notification appears to have been done as a matter of courtesy. First Hawaiian Bank did not actually produce the documents to the Army until August 12, 1998.

* * *

An Article 32 hearing was conducted from June 25 to June 26, 1998. On July 16, 1998, the Army investigating officer issued a report reviewing the evidence and recommended that the charges against SGM Flowers be adjudicated in a trial by General Court-Martial. The report does not mention financial records, and all evidence indicates that the financial records were not used (or even received by the Army) in that Article 32 proceeding.

Marshall Flowers was represented at the Article 32 hearing by military lawyers and civilian lawyer Charles Gittens. Mr. Gittens specializes in military defense cases and is known for handling

"high profile" cases involving charges against, among others, the former Sergeant-Major of the Army and the Navy Commander in the U.S.S. Greenville submarine incident with the Japanese fishing vessel Ehime Maru.

After the Article 32 hearing, Mr. Gittens contacted then-Capt. Ohlweiler or Capt. Bagwell, the Army's prosecutors for the proceeding, about "cutting a deal." Gittens told the Army that he was interested in "saving Sergeant Major Flowers' retirement, and that was his top priority, and . . . wanted to propose that [the Army] would dismiss the charges and that Sergeant Major Flowers would accept punishment under Article 15, and would immediately submit his retirement." Gittens prepared a "Memorandum of Agreement for Alternative Disposition of Charges," under which the Army would withdraw the charges and Flowers would accept non-judicial punishment under Article 15 of the UCMJ and make an immediate request for retirement with leave to begin on September 1, 1998. Flowers signed the agreement on June 26, 1998; the Army signed it on August 4, 1998.

At some point thereafter, Flowers chose instead to proceed with the court-martial. This was against the advice of his lawyers. Army defense counsel told Flowers, after consultation with other military lawyers and Mr. Gittens, that "disposition by Article 15 is a real victory for the defense" and that "Given the videotape evidence against you, it is very unlikely that you will be completely acquitted." Counsel advised "I can find no reason for you to demand trial by court-martial in this case. As your legal advisor, I genuinely believe demanding a trial by court-martial is irresponsible and totally unsound . . .

I urge you to reconsider and accept the Article 15 offered to you in this case." Although it is not exactly clear from the present record, it appears that Flowers accepted the advice. In any event, a second "Memorandum of Agreement for Alternative Disposition of Charges" was signed by Flowers and his lawyer, Charles Gittens, on August 22, 1998 and by the Army on August 28, 1998.

An Article 15 hearing was then held on August 28, 1998. The proceedings allow an accused to present matters in defense of the charges or to mitigate punishment. Flowers and military defense counsel attended, but apparently did not present any defense or evidence. Flowers was found to have committed several acts in violation of Article 121 (larceny) of the UCMJ, and punishment was imposed in the form of forfeiting $1,788 per month for two months and receiving a formal letter of reprimand. The records released by First Hawaiian Bank and Fort Jackson FCU that are the subject of this action were not presented at the Article 15 proceeding.

Flowers appealed the Article 15 punishment. (As part of the appeal, Flowers treats the financial information as exculpatory as he argued: "Documents were subpoenaed referencing my bank account. The withholding of these documents at the Article 32 investigation prejudiced the outcome of this case."). The appeal was denied by General Hill.

Marshall Flowers did not immediately submit retirement papers as set forth in the Memorandum of Agreement According to an Affidavit of Marshall Flowers, the Article 15 punishment was "withdrawn" and, on November 13, 1998, the charges were re-preferred. A second Article 32 hearing was eventually held on March 18 and 19,

> 1999. The result of the second hearing appears to have been favorable to Flowers. The recommendation apparently was for "administrative separation" or "administrative disposition" although General Hill and military prosecutors had apparently decided to proceed with a General Court-Martial anyway.
>
> At this point, Flowers' term of service expired on May 13, 1999. As an enlisted soldier, to remain in the service, he needed to reenlist. On April 27, 1999, Flowers' immediate supervisor imposed a formal "bar to re-enlistment," effectively ending his military career at 28 years. The bar to re-enlistment cited the previous non-judicial punishment (the Article 15 proceedings and findings of violations of Article 121). The commanding officer indicated that he "only recently learned that a bar had not been imposed previously, as would have been appropriate." General Hill approved the bar and testified that such a bar should have been imposed long before as a matter of course once charges were preferred.
>
> On May 27, 1999, military counsel on behalf of Flowers appealed the bar to re-enlistment through Army channels. The appeal was denied on June 21, 1999. General Hill then directed that Flowers had 14 days to submit his retirement. Flowers presumably then retired with full military benefits. He has claimed on several occasions that he was forced to retire with 28 years of service when his goal was 30 years.

Pet. App. 61a-69a (internal citations to evidentiary support omitted).

With regards to the granting of summary judgment in favor of First Hawaiian as to punitive damages, the court determined that there was no evidence coming close to the

"willfulness" standard for such an award under the RFPA. Pet. App. 72a. With regards to the Petitioners' Rule 56(f) request for more time to discover evidence to support their claim for punitive damages, the district court denied the request based on the Petitioners' failure to show that such evidence could possibly result from additional discovery. The court reasoned:

> The only question is whether to allow the Plaintiffs more time for discovery under Rule 56(f) to seek evidence of willfulness. But there has been no showing of any possibility of such evidence. The relevant discovery has occurred. Plaintiffs have obtained depositions or documents, or had an opportunity to discover such evidence, from all the First Hawaiian Bank and Fort Jackson FCU employees who had contact or responsibility with compliance with the particular subpoenas at issue. Further discovery in this regard from the Army witnesses would not be relevant to the state of mind of the Bank Defendants. At best, Plaintiffs have some hope that evidence of egregiousness will develop and this is not enough.

Pet. App. 73a-74a.

With regards to the granting of summary judgment as to compensatory or actual damages, the district court determined that Petitioners lacked any evidence to establish a causal link between First Hawaiian's disclosure of their bank records and their claimed damages.

> Marshall Flowers cannot prove that his allegedly forced retirement had anything to do with the disclosures. The records disclosed appear to be nothing more than bank statements. True, bank statements contain personal information. However, the undisputed evidence is that the Army did not even have the records at the time of the

> first Article 32 hearing. The information in the records had nothing to do with the decision to prosecute Flowers, to pursue an Article 32, to cause the Army to impose a bar to re-enlistment, or otherwise to cause Flowers to retire early. The Army's determination to begin Article 32 proceedings against Marshall Flowers *preceded* the release of financial records. The Army's recommendation to proceed with a General Court-Martial had nothing to do with the release of records. Any subsequent discipline the Army imposed had nothing to do with the release of financial records. There simply is no evidence that any alleged damages could have been caused by First Hawaiian Bank's (or, for that matter, Fort Jackson FCU's) release of financial information. (If anything, the financial information helped him or could have helped him if it is true that there was nothing incriminating in the records as Flowers has argued.)

Pet. App. 77a (internal citations to evidentiary support omitted).

In denying the Petitioners' Rule 56(f) request for a continuance to allow more time to conduct discovery as to compensatory damages, the district court stated:

> The Court can conceive of no evidence that would create a genuine issue of fact that the financial disclosures by First Hawaiian Bank would have caused the Army to impose a bar to re-enlistment for SGM Flowers, and there is nothing in the present record to indicate as such. There is every indication that the Army's decision to end SGM Flowers' career was independent of the technical RFPA violations. There being no genuine issue of material fact, the Court GRANTS First Hawaiian Bank's Motion for Summary Judgment, insofar as it seeks a finding that Plaintiffs are not

> entitled to any damages under the RFPA in excess of the statutory damages.

Pet. App. 78a.

In an unpublished memorandum decision filed on May 3, 2006, the court of appeals affirmed summary judgment in favor of First Hawaiian on the claims of compensatory and punitive damages. Pet. App. 1a-7a. The court of appeals properly rejected the Petitioners' challenge based on the lack of any evidence to support their claim for damages, stating:

> The record shows that the Flowers failed to produce or cite any evidence to establish a genuine issue of material fact sufficient to overcome summary judgment. . . . There is also no indication that the Flowers are entitled to compensatory or punitive damages as the record evidence provides no connection between the conduct of the bank or the credit union and the Flowers' claimed damages, and nothing suggests that [First Hawaiian] or the credit union acted willfully or intentionally to violate the Flowers' rights under the RFPA.

Pet. App. 5a-6a. The court of appeals also affirmed the denial of the Petitioners' Rule 56(f) motion to stay summary judgment and other discovery rulings. The court determined that the Petitioners' challenge to those rulings also lacked merit. Pet. App. 6a.

## REASONS FOR DENYING THE PETITION

The unpublished decision of the court of appeals is entirely fact-bound as to First Hawaiian. The court correctly applied the *de novo* standard of review in affirming

summary judgment in favor of First Hawaiian, and properly rejected the challenge by Petitioners based on the absence of any evidence to support their claim for damages. The decision as to First Hawaiian does not conflict with any decision of this Court, or any decision of a court of appeals or state high court. The only conflict alleged in the petition pertains to the *Feres* doctrine, an issue that does not involve First Hawaiian. Moreover, the decision as to First Hawaiian does not extend beyond Petitioners herein, and does not involve any constitutional issue or other important federal question that could give rise to an issue of national importance. Finally, the unpublished decision cannot be cited as binding precedent under the Rules of the Ninth Circuit Court of Appeals. *See* 9th Cir. R. 36-3. Accordingly the decision presents no compelling reason warranting this Court's attention. The petition should be denied.

### A. Petitioners Have Not Presented Any Issue As To First Hawaiian Involving A Conflict Of An Important Question Of Federal Law

Supreme Court Rule 10 provides that a "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only for compelling reasons*." Sup. Ct. R. 10 (emphasis added). The rule also sets forth examples illustrating the character of reasons that may justify the granting of certiorari. The examples provided in the rule suggests that compelling reasons for certiorari will most commonly arise where there exists a *conflict of an important question of federal law* between the decision in question and a

decision of this Court, another court of appeals, or a state court of last resort.[5] *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (certiorari should not be granted except "in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals"). The decision as to First Hawaiian does not present such a conflict.

The only conflict of a federal question raised in the petition pertains to the application of the *Feres* doctrine to bar the Petitioners' RFPA claims against the Army respondents. In fact, nearly the entire petition is dedicated to the *Feres* issue. *See* Pet. However, the *Feres* doctrine applies only to the Army respondents, as that doctrine, where applicable, operates to bar suits only against the government. Pet. App. 3a-4a. First Hawaiian is not a governmental entity and has never asserted the *Feres* doctrine as a defense to the RFPA claims brought against

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[5] Supreme Court Rule 10 states the following pertinent examples dealing with decisions by a federal circuit court of appeals:

> (a) a United States court of appeals has entered a decision in *conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort*; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure of the lower court, as to call for an exercise of this Court's supervisory power.
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an *important question of federal law that* has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10 (emphasis added).

it. To the contrary, First Hawaiian admitted to committing a violation of the RFPA pursuant to the court of appeals' decision in *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002), thus leaving only the issue of damages in dispute. CR 217.

Even though the *Feres* doctrine does not apply to First Hawaiian, Petitioners have attempted to link First Hawaiian (and FJFCU) to that issue by asserting that the deposition testimony of Army personnel was necessary to defeat summary judgment and that the dismissal of the Army pursuant to the *Feres* doctrine was the reason re-deposition of Army personnel was not permitted. *See* Pet. 25.[6] That assertion is not accurate. The orders of the district court indicate clearly that re-deposition of Army personnel was not permitted based on the court's determination that such testimony would be irrelevant to the remaining claims against First Hawaiian and FJFCU. Pet. App. 73a-74a, 95a-96a. Accordingly, the *Feres* doctrine had nothing to do with the court's denial to allow re-deposition of the Army personnel.

Therefore, Petitioners have not presented any issue involving a conflict of an important federal question as to First Hawaiian. Nor have they alleged that the court of appeals' *de novo* review constituted an unacceptable departure by the lower court from its accepted and usual course of judicial proceedings requiring an exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a). Accordingly, there

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[6] Petitioners argue: "This Court should grant review since the court's import of *Feres* prohibited the Flowers from obtaining discovery of federal witnesses to adequately respond to the financial institutions motions for summary judgment." Pet. 25.

is no compelling reason for the granting of certiorari and the petition should be denied.

### B. The Issues Presented As To First Hawaiian Involve Only Challenges To The Lower Court's *De Novo* Review Of The Factual And Evidentiary Record

The court of appeals correctly affirmed summary judgment in favor of First Hawaiian based on a *de novo* review of the record which revealed the absence of any evidence to support the Petitioners' claim for damages. It is evident from the petition that Petitioners seek to have this Court conduct a further *de novo* review of the record evidence as the petition states "We believe the district judge abuse[d] his discretion by denying the Flowers' Rule 56(f) motion and granting the financial institutions summary judgment." Pet. 28.

The Petitioners' request for this Court to perform the role of a circuit court of appeals is not an appropriate grounds for granting certiorari. Supreme Court Rule 10 expressly cautions that "*[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.*" Sup. Ct. R. 10 (emphasis added).

Moreover, this Court has long held that challenges based on the factual record or on the weighing of evidence is not a sufficient basis for the granting of certiorari. *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) (Supreme Court is not the place to review a conflict of evidence and so where conclusions of the court of appeals depends on appreciation of circumstances which admit of different interpretation, the Supreme Court will

not interfere); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) (Supreme Court does not grant certiorari to review evidence and discuss specific facts).

The Petitioners' challenges to the lower court's decision based on asserted error of the court's factual and evidentiary determinations do not constitute compelling reasons for granting certiorari. The petition should be denied.

### C. The Issues Presented As To First Hawaiian Do Not Extend Beyond The Petitioners Herein And Do Not Give Rise To Any Issue Of National Importance

This lawsuit was brought by Petitioners only, and not a class of individuals. Petitioners seek only monetary damages based on the disclosure of their bank records. Clearly, the issues presented as to First Hawaiian do not extend beyond the Petitioners herein which presents yet another reason to deny the petition. *See Rice,* 349 U.S. at 79 (certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties").

In addition, the questions presented as to First Hawaiian do not involve any constitutional issues or any other matters giving rise to an issue of national importance. The Petition should be denied.

## CONCLUSION

The petition for writ of certiorari should be denied as to First Hawaiian.

Respectfully submitted,

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No. 06-819

IN THE

# Supreme Court of the United States

MARSHALL K. FLOWERS AND ANNA K. FLOWERS,
PETITIONERS,

V.

UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary Of The Army; JOHN OHLWEILER, Captain,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENT FORT JACKSON FEDERAL CREDIT UNION IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

1. Whether the Magistrate's discovery order was properly reversed to bar re-deposition of Army personnel, based on the finding that testimony from Army personnel would be irrelevant to the remaining claims against Fort Jackson Federal Credit Union after dismissal of the Army;

2. Whether the Flowers' FRCP Rule 56(f) motion to stay summary judgment pending the re-deposition of Army personnel was properly denied, based on the conclusion that Fort Jackson Federal Credit Union's motion for summary judgment primarily involved questions of law on undisputed facts, there had been ample time for discovery, and there had been no showing that further discovery could lead to a different conclusion; and

3. Whether summary judgment was properly granted in favor of Fort Jackson Federal Credit Union.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Defendant-Respondent Fort Jackson Federal Credit Union, which name has changed to All South Federal Credit Union, does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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No. 06-819

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MARSHALL K. FLOWERS AND ANNA K. FLOWERS,
PETITIONERS,

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UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary Of The Army; JOHN OHLWEILER, Captain,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENT FORT JACKSON FEDERAL CREDIT UNION IN OPPOSITION

## OPINIONS AND ORDERS BELOW

The Court of Appeals' memorandum opinion affirming the District Court's decisions and order denying rehearing are both unreported. (Pet.App. 1a, and 2a-7a). The District Court's order reversing the magistrate's discovery order is reported at 289 F.Supp.2d 1213 (D.Haw. 2003). (Pet.App. 81a-97a; CR 388). The District Court's order granting summary judgment and denying FRCP Rule 56(f) stay of summary judgment is reported at 295 F.Supp.2d 1130 (D.Haw. 2003). (Pet.App. 59a-80a; CR 443).

## JURISDICTION

The memorandum opinion of the Court of Appeals was entered on April 7, 2006, and Judgment thereon was filed October 10, 2006. (Pet.App. 2a-7a). The Court of Appeals' order denying rehearing was entered on September 14, 2006. (Pet.App. 1a). The petition for a writ of certiorari was filed on December 6, 2006. Plaintiff-Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Defendant-Respondent Fort Jackson Federal Credit Union ("FJFCU"), which name has changed to All South Federal Credit Union, does not dispute jurisdiction.

## CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, AND REGULATIONS

The points on appeal directed at FJFCU, involve 12 U.S.C. §§ 3402 and 3413 of the Right to Financial Privacy Act (12 U.S.C. §§ 3401-3422)("RFPA"), as well as Rules 26, 56(a) and 56 of the Federal Rules of Civil Procedure ("FRCP").

## CONCISE STATEMENT OF THE CASE

Petitioner-Plaintiff Marshall Flowers was a Sergeant Major of the United States Army, who had been apprehended for alleged shoplifting at the military Post Exchange at Schofield Barracks, Hawaii, in December of 1997. Subsequently, the United States Army ("Army") conducted a criminal investigation of Petitioner-Plaintiffs Marshall Flowers and Anna Flowers (the "Flowers"), in relation to the return of duplicate merchandise on multiple occasions to Army and Navy Exchanges, in exchange for cash.

As a part of the Article 32 investigation, subpoenas were issued to FJFCU and First Hawaiian Bank ("FHB"), for the production of Mr. Flowers' financial records. The FJFCU

subpoena was issued on June 24, 1998. The face of the FJFCU subpoena plainly stated that the documents were for "a General court-martial of the United States...appointed by MG James T. Hill, to provide evidence in the matter of United States v. SGM Marshall Flowers...Failure to appear...is punishable by a fine...or imprisonment...10 U.S.C. § 847...[or] being taken into custody and brought before the court-martial... Manual for Court Martial R.C.M. 708(e)(2)(G)."

The Flowers filed suit against the Army, FHB and FJFCU, alleging in part that FJFCU did not comply with the relevant provisions of the RFPA when it released the Flowers' financial records.

Initially, the Flowers noticed the depositions of Army personnel and FJFCU employees without consideration to the location and schedule of witnesses, or the schedule of defense counsel. However, through a myriad of e-mails, the parties agreed to block off a week for the depositions, and to conduct the depositions in the location of the witness. Approximately a week before the scheduled depositions, counsel for the Flowers confirmed the depositions. However, the Flowers subsequently asserted within days of the scheduled depositions, that they could not attend. The Flowers did not appear at the depositions, nor did they file a protective order or discovery motion to prevent the depositions from going forth.

Immediately prior to the dispositive motions cutoff, the Flowers submitted a discovery motion to the Magistrate, seeking to re-depose Army witnesses. The Magistrate permitted the Flowers to re-depose Army witnesses, conditioned upon the Flowers' reimbursement of one-half defendants' costs in conducting the new depositions, and time restrictions. The Flowers appealed the Magistrate's discovery order to lift the conditions, making their first motion before the District Court to re-depose Army Witnesses.

In the mean time, the Army filed a motion for summary judgment. The District Court dismissed the claims against the

Army pursuant to *Feres v. United States,* 340 U.S. 135 (1950), and concurrently held that the testimony of Army personnel would therefore be irrelevant to the remaining claims against FHB and FJFCU, reversing the Magistrate's discovery order in so far as it permitted re-deposition of Army witnesses.

Thereafter, FJFCU moved for summary judgment on the RFPA claims based upon the statutory exception provided within 12 U.S.C. § 3413(e). The Flowers moved to continue the motion for summary judgment pending discovery pursuant to FRCP Rule 56(f), seeking a second time to re-depose Army witnesses. The Flowers argued that it was necessary to re-depose Army witnesses to determine whether the FJFCU subpoena was "manufactured" *ex post facto* in 2002 (not 1998) to conform to an opinion in the case of *Flowers v. First Hawaiian Bank,* 295 F.3d 966 (9th Cir. 2002).[1] The District Court awarded summary judgment in favor of FJFCU, and denied the Flowers' motion to continue holding that (1) the issues involved are primarily questions of law, (2) there had been ample time for discovery, (3) there was no showing that further discovery could lead to a different conclusion, (4) no evidence supported allegations that the FJFCU subpoena was manufactured after the fact, and (5) the FJFCU subpoena squarely fit within the RFPA exception under 12 U.S.C. § 3413(e).

In an unpublished memorandum opinion, the Court of Appeals affirmed the award of summary judgment in favor of FJFCU, concluding that the subpoena issued to FJFCU satisfied the exception to RFPA liability under 12 U.S.C. § 3413(e). The Court of Appeals further affirmed the District Court's two rulings denying re-deposition of Army witnesses, declaring that the Flowers' challenge to discovery rulings were without merit.

Review on certiorari is not warranted in so far as the Court of Appeal's unpublished memorandum opinion is attributable to FJFCU. As to FJFCU, the Court of Appeal's decisions (1) do not

---

[1] The opinion in *Flowers v. First Hawaiian Bank,* 295 F.3d 966 (9th Cir. 2002), set forth a four part test to determine the applicability of the RFPA exception 12 U.S.C. § 3413(e). *See* Section A, below.

address any a question regarding *Feres*, the only important question of law the Flowers purport to raise on certiorari, (2) do not conflict with any decision of another Federal court of appeal or state court of last resort, and (3) do not present departures from the accepted and usual course of judicial proceedings. Accordingly, there is no good cause for this Court's review of decisions attributable to FJFCU.

## I. Statutory Scheme

The RFPA prescribes standards and procedures that the government must follow when subpoenaing a bank customer's financial records. The RFPA requirements are subject to a number of statutory exceptions, including the exception enumerated in 12 U.S.C. § 3413(e), as follows:

> Nothing in [the RFPA] shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.

12 U.S.C. §3413(e) (1999) (emphasis added) (*see* Pet.App. 111a).

The Ninth Circuit Court of Appeals has set forth the following four part test in determining the applicability of 12 U.S.C. § 3413(e):

> This exemption has four requirements, all of which must be met for it to apply: the applicable financial records must be sought by (1) a governmental authority, (2) under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts, (3) in connection with litigation, (4) to which the governmental authority and the customer are parties.

*See Flowers v. First Hawaiian Bank*, 295 F.3d 966, 971 (9th Cir. 2002).

The Fifth Circuit Court of Appeals has further interpreted 12 U.S.C. § 3413(e), holding that a financial insitution is entitled to rely upon the exception even where the Army failed to comply with its own regulations governing Court Martial and subpoenas. *See Roberts v. Sabine State Bank & Trust Co.*, 226 F.3d 374, 375 (5th Cir. 2000) (emphasis added); *see also Ismail v. Old Kent Bank & Trust Co.*, 893 F.2d 1334 (6th Cir. 1990) ("even if the subpoenas were somehow defective, the bank would still not be civilly liable [under the RFPA] if there was a good faith reliance on the subpoenas").

## II. Factual Background

The factual background has been succinctly summarized by the District Court for the District of Hawaii, in its Order Granting In Part and Denying In Part Motions for Summary Judgment (*see* Pet.App. 63a-69a; CR 443) as follows:

> In December of 1997, Sergeant Major Marshall Flowers was apprehended for alleged shoplifting at the military Post Exchange at Schofield Barracks, Hawaii, after he was observed apparently shoplifting on a security video. Prior to December of 1997, the Army had been investigating Flowers because he had returned duplicate items on multiple occasions to Army and Navy Exchanges, often without receipts, in exchange for cash. From December 1997 until March 1998, a military Criminal Investigation Division ("CID") investigated the conduct of both Marshall and Anna Flowers. Among other evidence, a search of his residence found numerous duplicate and unopened electronic, computer, and other high-value items. Also found were multiple refund receipts and what is described as "homemade" refund receipts on his computer.
>
> In April of 1998, the Army filed 42 charges of larceny against Flowers. An Article 32 investigation was begun but proceedings were postponed at the request of defense counsel until June of 1998.

***On June 24, 1998, a DD Form 453 subpoena was issued by the United States Army to Fort Jackson FCU*** in South Carolina requesting "all bank account in formation since 1 Jan 97, to include #582593." ***It also cited Section 847 of the Uniform Code of Military Justice regarding punishment for failure to comply with the subpoena as well as a "Manual for Courts-Martial R.C.M. 703(e)(2)(G)." The subpoena differed on its face from the subpoena issued to First Hawaiian Bank because it stated that the documents were for "a General court-martial of the United States... appointed by MG James T. Hill to provide evidence in the matter of United States v. SGM Marshall Flowers."*** In contrast, the subpoena issued to First Hawaiian Bank was stated to be for "an Article 32 hearing," which is preliminary to a court-martial proceeding.

There appears to be no dispute that when the Fort Jackson FCU subpoena was issued there was not as yet any actual General Court-Martial proceeding ongoing (except perhaps to the extent an Article 32 could be considered as a necessary prerequisite to -- and therefore part of -- a court-martial). Perhaps the Army only intended to use the documents if the proceedings reached the court-martial stage, or perhaps the subpoena was wrong. The deposition testimony of Major Ohlweiler, the officer who signed both subpoenas, indicates the Fort Jackson FCU subpoena contained erroneous language. ("The paralegal typed it out and I signed it, and he or she, and I don't remember who it was, wrote General Court-Martial rather than Article 32")]. In any event, there is no evidence that anyone from Fort Jackson FCU knew (or had reason to know) that the documents were, at that point anyway, for an Article 32 hearing rather than for a General Court-Martial. ***A cover letter from Ohlweiler to Fort Jackson FCU accompanying the subpoena stated that "SGM Flowers is currently facing a Court-Martial for 42 specifications of larceny."*** Fort Jackson FCU complied with the subpoena by mailing credit union account statements to the Army on July 2, 1998.

An Article 32 hearing was conducted from June 25 to June 26, 1998. On July 16, 1998, the Army investigating officer

issued a report reviewing the evidence and recommended that the charges against SGM Flowers be adjudicated in a trial by General Court-Martial. The report does not mention financial records, and all evidence indicates that the financial records were not used (or even received by the Army) in that Article 32 proceeding.

Marshall Flowers was represented at the Article 32 hearing by military lawyers and civilian lawyer Charles Gittins. Mr. Gittens specializes in military defense cases and is known for handling "high profile" cases involving charges against, among others, the former Sergeant-Major of the Army and the Navy Commander in the U.S.S. Greenville submarine incident with the Japanese fishing vessel Ehime Maru.

After the Article 32 hearing, Mr. Gittens contacted then-Capt. Ohlweiler or Capt. Bagwell, the Army's prosecutors for the proceeding, about "cutting a deal." Gittens told the Army that he was interested in "saving Sergeant Major Flowers' retirement, and that was his top priority, and. .. wanted to propose that [the Army] would dismiss the charges and that Sergeant Major Flowers would accept punishment under Article 15, and would immediately submit his retirement.". Gittens prepared a "Memorandum of Agreement for Alternative Disposition of Charges," under which the Army would withdraw the charges and Flowers would accept non-judicial punishment under Article 15 of the UCMJ and make an immediate request for retirement with leave to begin on September 1, 1998. Flowers signed the agreement on June 26, 1998; the Army signed it on August 4, 1998.

At some point thereafter, Flowers chose instead to proceed with the court-martial. This was against the advice of his lawyers. Army defense counsel told Flowers, after consultation with other military lawyers and Mr. Gittens, that "disposition by Article 15 is a real victory for the defense" and that "Given the videotape evidence against you, it is very unlikely that you will be completely acquitted." Counsel advised "I can find no reason for you to demand trial by court-martial in this case. As your legal advisor, I genuinely

believe demanding a trial by court-martial is irresponsible and totally unsound.... I urge you to reconsider and accept the Article 15 offered to you in this case." Although it is not exactly clear from the present record, it appears that Flowers accepted the advice. In any event, a second "Memorandum of Agreement for Alternative Disposition of Charges" was signed by Flowers and his lawyer, Charles Gittens, on August 22, 1998 and by the Army on August 28, 1998.

An Article 15 hearing was then held on August 28, 1998. The proceedings allow an accused to present matters in defense of the charges or to mitigate punishment. Flowers and military defense counsel attended, but apparently did not present any defense or evidence. Flowers was found to have committed several acts in violation of Article 121 (larceny) of the UCMJ, and punishment was imposed in the form of forfeiting $1,788 per month for two months and receiving a formal letter of reprimand. The records released by First Hawaiian Bank and Fort Jackson FCU that are the subject of this action were not presented in the Article 15 proceeding.

Flowers appealed the Article 15 punishment. (As part of the appeal, Flowers treats the financial information as exculpatory as he argued: "Documents were subpoenaed referencing my bank account. The withholding of these documents at the Article 32 investigation prejudiced the outcome of this case."). The appeal was denied by General Hill.

Marshall Flowers did not immediately submit retirement papers as set forth in the Memorandum of Agreement. According to an affidavit of Marshall Flowers, the Article 15 punishment was "withdrawn" and, on November 13, 1998, the charges were re-preferred. A second Article 32 hearing was eventually held on March 18 and 19, 1999. The result of the second hearing appears to have been favorable to Flowers. The recommendation apparently was for "administrative separation" or "administrative disposition" although General Hill and military prosecutors had

> apparently decided to proceed with a General Court-Martial anyway.
>
> At this point, Flowers' term of service expired on May 13, 1999. As an enlisted soldier, to remain in the service, he needed to reenlist. On April 27, 1999, Flowers' immediate supervisor imposed a formal "bar to re-enlistment," effectively ending his military career at 28 years. The bar to re-enlistment cited the previous non-judicial punishment (the Article 15 proceedings and findings of violations of Article 121). The commanding officer indicated that he "only recently learned that a bar had not been imposed previously, as would have been appropriate." General Hill approved the bar and testified that such a bar should have been imposed long before as a matter of course once charges were preferred.
>
> On May 27, 1999, military counsel on behalf of Flowers appealed the bar to re-enlistment through Army channels. The appeal was denied on June 21, 1999. General Hill then directed that Flowers had 14 days to submit his retirement. Flowers presumably then retired with military benefits. He has claimed on several occasions that he was forced to retire with 28 years of service when his goal was 30 years.

(*See* Pet.App. 63a-69a; CR 443) (emphasis added, internal citations of evidentiary support omitted).

**III. Procedural Background**

On June 21, 2001, Mr. Flowers individually filed suit against the Army and FJFCU in the District Court for the District of Hawaii, alleging violations of the RFPA, 12 U.S.C. § 3401 et seq. On September 18, 2001, Mr. Flowers filed his First Amended Complaint. (CR 13).

Upon motion by FJFCU, on November 21, 2002, the District Court consolidated the two related cases, *Flowers v. First*

*Hawaiian Bank*, Civ. No. 99-00335 and *Flowers v. United States Department of the Army and Fort Jackson Federal Credit Union*, Civ. No. 01-0041. (CR 92).

On April 24, 2003, the Flowers jointly filed the Second Consolidated Amended Complaint against FHB, the Army and FJFCU. (CR 222). This was the first time that Mrs. Flowers had properly brought suit against FJFCU.

On April 16, 2003, the Flowers noticed the depositions of Major John Ohlweiler and Major Randy Bagwell to be conducted in Honolulu, Hawaii in May 2003. These depositions were noticed without consideration to the schedules of the witnesses or the defense. (*See also* CR 251, at p. 4). Likewise, on May 23, 2003, the Flowers noticed the depositions of FJFCU employees Velma Jones and Kenneth Creticos to be conducted in Honolulu, Hawaii in June 2003, again without confirming the availability of witnesses or the defense. However, through a myriad of subsequent e-mails, counsel for the Flowers and counsel for the defense agreed that the Flowers would depose Army witnesses General James T. Hill, Major John Ohlweiler, and Major Randy Bagwell, as well as FJFCU employees Velma Jones and Kenneth Creticos, all during the week of July 21, 2003, at the physical locations the respective witnesses in Washington, D.C., Miami, Florida and Columbia, South Carolina. (Opp.Pet.App., Appendix "A", at 2a; CR 318). As late as July 17, 2003, counsel for the Flowers confirmed the dates of the depositions. (*Id.*). FJFCU noticed the depositions of the Army witnesses accordingly, and the Army noticed the depositions of FJFCU witnesses. (*Id.*). The five witnesses were prepared for deposition, the schedules of the witnesses were cleared for deposition, the schedules of defense counsel were cleared for deposition, and travel arrangements were made for defense counsel to travel from Hawaii to the continental United States. Within days of the scheduled depositions, the Flowers suddenly indicated that they would be unable to attend. (*Id.*) Neither the Flowers nor their attorney appeared at the depositions. The Flowers did not file a timely discovery motion or motion for protective order to prevent the depositions from going forward. (*Id.*)

Nonetheless, on September 11, 2003, the Magistrate Judge granted the Flowers' discovery motion to re-depose the five witnesses by November 30, 2003, provided (1) the depositions be conducted in the location of the deponent (not Hawaii) by November 30, 2003, (2) the depositions be limited to two hours, (3) the Flowers reimburse Defendants for half the cost incurred in the new depositions, and (4) the depositions could be taken by telephone or video conference. (Opp.Pet.App., at 2a-3a; CR 318; Pet.App. 95a).

Rather than re-depose Army witnesses as allowed, the Flowers appealed the Magistrate's discovery order on September 18, 2003, requesting that the above conditions be lifted. (CR 326). This was the Flowers' first motion made before the District Court, to re-depose Army witnesses. In the meantime, the Army filed a motion for summary judgment based on the *Feres* doctrine. (CR 388).

On October 31, 2003, the District Court dismissed the claims against the Army. (Pet.App. 83a-95a; CR 388). The District Court also concurrently reversed the Magistrate's discovery order in so far as it related to the re-deposition of Army witnesses, holding that ***"given the dismissal of the [Army], the testimony of the Army witnesses is irrelevant" to the remaining claims against FJFCU and FHB*** (hereinafter "Order Reversing Magistrate's Discovery Order"). (Pet.App. 95a-97a; CR 388). In other words, the District Court denied the Flowers first motion to re-depose Army witnesses. However, the Flowers were free to re-depose the FJFCU witnesses.

On October 22, 2003, FJFCU filed Motion for Partial Summary Judgment Re: RFPA Claims. (CR 375). Therein, FJFCU explained:

> ... a subpoena is exempt from the RFPA under §3413(e) where records are sought by (1) a governmental authority, (2) under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts, (3) in connection with litigation, (4) to which the governmental authority and the

customer are parties. 12 U.S.C. 3413(e) (1999); *See also Flowers v. First Hawaiian Bank*, 295 F.3d 966, 971 (2002). Based on Plaintiffs' own allegations, all of these criteria are satisfied and FJFCU is entitled to judgment as a matter of law.

* * * *

...it is clear that a subpoena issued pursuant to a court-martial meets the second requirement of 12 U.S.C. 3413(e). The subpoena issued to FJFCU clearly stated on its face that it was issued pursuant to a General court-martial proceeding.

Furthermore, it is irrelevant whether the subpoena was, in fact, issued in an Article 32 proceeding when, on its face, the subpoena that is actually issued clearly states that it is pursuant to a "General court-martial"....Since FJFCU's subpoena states on its face that it is a subpoena in a "General court-martial", the subpoena does not invoke nonexistent legal authority as the basis for its issuance. In fact, a closer look at the June 24, 1998 subpoena directs the receiver [FJFCU] to look at "R.C.M. 708(e)(2)(G)" for legal authority regarding this particular subpoena. As indicated above, RCM 708(e)(2)(G) clearly provides that a subpoena may be issued by a court-martial. Therefore, FJFCU had legal authority and a basis for responding to the subpoena.

(CR 375 (citations omitted)).

On November 13, 2003, the Flowers filed a Rule 56(f) Motion to Stay FJFCU's Summary Judgment Proceeding Pending Discovery ("Rule 56(f) Motion"), seeking a second time to re-depose Army witnesses. (CR 404, 408). The Flowers asserted that re-deposition of Army witnesses was necessary to determine whether the FJFCU subpoena issued in 1998 was perhaps "manufactured" *ex post facto* in 2002 to conform to an opinion in the case of *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir.

2002)[2], and FJFCU's alleged culpability thereto. (Pet.App. 71a).

The Flowers re-deposed the FJFCU witnesses on November 17, 2003. (CR 445, Exhibits. G - H).

The District Court subsequently granted FJFCU's Motion for Partial Summary Judgment Re: RFPA claims, and denied the Flowers' Rule 56(f) Motion on December 5, 2003 (hereinafter "Order Denying Rule 56(f) Motion"). (CR 445). The District Court reasoned as follows:

> The Court DENIES Plaintiffs' request for a continuance under Rule 56(f) ***because the issues involved are primarily questions of law on undisputed facts, because there has been ample time for discovery, and because there has been no showing that further discovery could lead to a different conclusion.***
>
> * * * *
>
> ***Facially, ... the [FJFCU] subpoena was one that fits within an exception [to the RFPA]. There was no way Fort Jackson FCU would have, or should have, known that the underlying proceeding had not yet reached a court martial stage. As stated earlier, the Army in the subpoena's cover letter reiterated that the information was needed for a General Court Martial. Even if the Army incorrectly listed the subpoena, perhaps prematurely, as being for a General Court Martial, this is not Fort Jackson FCU's fault.*** *See Roberts v. Sabine State Bank & Trust Co.*, 226 F.3d 374, 375 (5th Cir. 2000) (applying section [12 U.S.C.] 3413(e) and finding bank not liable under the RFPA for disclosures made during a General Court Martial even if the Army violated its own regulations).

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[2] The opinion in *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002), set forth a four part test to determine the applicability of the RFPA exception 12 U.S.C. § 3413(e). *See* Section A, below.

> ***Despite the Plaintiffs' arguments to the contrary, there is absolutely no evidence that the [FJFCU] subpoena was "manufactured" or otherwise fraudulently created after the Ninth Circuit's opinion in Flowers [v. First Hawaiian Bank, 295 F.3d 966 (9th Cir. 2002)] so as to fit within the language of the opinion.*** All the evidence indicates that the subpoena in the record is the subpoena issued on June 24, 1998 that led to the financial disclosures at issue in this action. Because the subpoena facially met the requirements under section 3413(e) and because there is absolutely no indication that [FJFCU] had reason to know that the subpoena might have been improper, the Court GRANTS [FJFCU's] motion for partial summary judgment. ***The subpoena fits squarely within the "litigation exception" to the RFPA under 12 U.S.C. § 3413(e).***

(*See* Pet.App. 61a, 70a-71a; CR 443)(emphasis added).

In an unpublished Memorandum Opinion, the Ninth Circuit Court of Appeals affirmed the award of summary judgment in favor of FJFCU, concluding "***The record establishes that [FJFCU] is not liable under the RFPA because the subpoena issued to [FJFCU] satisfies an exception to liability under 12 U.S.C. § 3413(e).***" (Pet.App. 5a-6a) (emphasis added). The Court of Appeals also upheld the Circuit Court's decisions to reverse the Magistrate's discovery order and deny the Flowers' Rule 56(f) Motion to re-depose Army witnesses, "conclud[ing] that they are also without merit." (Pet.App. 6a).

## ARGUMENT

Rule 10 of the Supreme Court Rules ("SCR") provides in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following,

although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Guided by SCR Rule 10, it is clear that the Flowers have not raised issues of the character necessary for review by the United States Supreme Court.

As to FJFCU, the Court of Appeal's unpublished decisions do not (1) address any question regarding *Feres,* the only important question of law the Flowers purport to raise on certiorari, (2) conflict with any decision of another Federal court of appeal or state court of last resort, and (3) present departures from the accepted and usual course of judicial proceedings. Review by this Court is therefore unwarranted.

## I. The Court of Appeals Has Not Decided A Question Regarding the *Feres* Doctrine As To Fort Jackson Federal Credit Union

The Flowers, by their own characterization, have only placed questions regarding *Feres* before this Court. However, the decisions attributable to FJFCU have no relationship to the *Feres* doctrine. Accordingly, there is no good cause for this Court's review of decisions attributable to FJFCU.

The Flowers' concede in a subsequent brief to this Court, that their sole contention on appeal is "whether *Feres* v. *United States,*

340 U.S. 135 (1950), bars [the Flowers'] claims under the [RFPA]..." (Opp.Pet.App., Appendix "B", at 4a)(internal quotations omitted). With respect to FJFCU, the Petition asks that this Court decide whether "the [lower] court's import of *Feres* prohibited the Flowers from obtaining discovery of [Army] witnesses to adequately respond to [FJFCU's] motion[] for summary judgment." (Pet.App. 25)(emphasis added).

The decisions attributable to FJFCU should not be reviewed on certiorari however, because, contrary to the Flowers' mischaracterization, said decisions did not address, involve, apply, import or reject the *Feres* doctrine. The only decisions attributable to FJFCU are (1) the District Court's decision to reverse the Magistrate's discovery order in so far as it permitted re-deposition of Army witnesses (*see* Order Reversing Magistrate's Discovery Order), (2) the District Court's decision denying the Flower's Rule 56(f) Motion to re-depose Army witnesses (*see* Order Denying Rule 56(f) Motion), (3) the District Court's award of summary judgment in favor of FJFCU (*see* Order Denying Rule 56(f) Motion), and (4) the Court of Appeals' decisions affirming the same. Memorializing these decisions attributable to FJFCU in written opinions, the Court of Appeals and District Court clearly framed their decisions as issues of fact and relevance to the RFPA – not a question of law as to *Feres*.

The Order Reversing Magistrate's Discovery Order unambiguously states that the District Court's decision to reverse the Magistrate's discovery order permitting re-deposition of Army witnesses, was based on its finding that "*the testimony of the Army witnesses is irrelevant*" to the remaining claims against FJFCU. (Pet.App. 95a-97a; CR 388).

Likewise, the Order Denying Rule 56(f) Motion specifies that summary judgment was granted in favor of FJFCU because "[t]he [FJFCU] subpoena fits squarely within the 'litigation exception' to the RFPA under 12 U.S.C. § 3413(e)." (Pet.App. 70a-71a; CR 443). The Order Denying Rule 56(f) Motion further indicates that the Rule 56(f) Motion to re-depose Army witness was denied "because the issues involved are primarily questions of law on

undisputed facts, because there has been ample time for discovery, and because there has been no showing that further discovery could lead to a different conclusion." (Pet.App. 61a; CR 443).

The Court of Appeals' memorandum opinion makes no mention of *Feres* as well, providing in relevant part:

> The record shows that the Flowers failed to produce or cite any evidence to establish a genuine issue of material fact sufficient to overcome summary judgment. The record establishes that [FJFCU] is not liable under the RFPA because the subpoena issued to [FJFCU] satisfies an exception to liability under 12 U.S.C. § 3413(e). There is also no indication that the Flowers are entitled to compensatory or punitive damages as the record evidence provides no connection between the conduct of [FHB] or [FJFCU] and the Flowers' claimed damages, and nothing suggests that [FHB] or [FJFCU] acted willfully or intentionally to violate the Flowers' rights under the RFPA. 12 U.S.C. § 3417(a) (3). Furthermore, the Flowers' tort claims against [FJFCU] lack any evidentiary support in the record. We must therefore conclude that the district court did not err in granting summary judgment to [FHB] or [FJFCU].
>
> * * * *
>
> We have considered exhibits the Flowers' remaining miscellaneous contentions – including...the Flowers' challenge to a number of the district court's discovery rulings – and we conclude that they are also without merit.

(Pet.App. 5a-6a) (footnotes omitted).

The memorandum opinion and underlying orders make no reference to *Feres* when discussing the bases of decisions attributable to FJFCU. Moreover, such decisions are limited to fact bound issues regarding (1) the relevance of testimony from Army witnesses, and (2) the FJFCU subpoena.

The only question of federal law raised by the Flowers is the *Feres* doctrine. However, the *Feres* doctrine is neither the basis for the Court of Appeal's decisions attributable to FJFCU, nor the basis for the District Court's underlying decisions attributable to FJFCU. Failing to raise questions of important federal law with respect to decisions attributable to FJFCU, review on certiorari thereof should be denied.

## II. The Flowers Make No Argument That Conflict Exists Between The Court of Appeals' Decisions Attributable To Fort Jackson Federal Credit Union And The Decisions of Other Federal And State Courts

The Flowers make no argument or showing that conflict exists between the Court of Appeals' unpublished decisions as to FJFCU, and the decisions of other federal courts or state courts of last resort. The Flowers are unable to do so as the Court of Appeals' decisions are in accord with those of other courts.

Although no state court of last resort has addressed the issue, the Fifth and Sixth circuits have reviewed the summary adjudication of 12 U.S.C. § 3413(e) defenses, in the presence of a subpoena which is alleged to be procedurally defective. The Fifth and Sixth circuits are also the only courts publishing opinions which attend to the relevance of a government entity's conduct, to the RFPA claims against a subpoenaed financial institution.

In the case of *Roberts v. Sabine State Bank & Trust Co.*, 226 F.3d 374 (5th 2000), *certiorari denied*, 532 U.S. 909 (2001), the Fifth Circuit was presented with facts strikingly similar to the facts here. In *Roberts*, the Army issued a subpoena for the disclosure of a bank customer's financial records pursuant to the Rules of Court Martial. The bank customer filed suit against the subpoenaed financial institution for violations the RFPA. Subsequently, summary judgment was entered in favor of the financial institution based upon 12 U.S.C. § 3413(e). On appeal, the bank customer argued that 12 U.S.C. § 3413(e) was not applicable because the subpoena at issue was defective. Specifically, the bank customer

asserted that Army failed to comply with its own notice and challenge (hearing) provisions when issuing the subpoena. The Fifth Circuit agreed that the subject subpoena was issued in violation of the Army's own rules governing subpoenas. *Id.*, at 376. Nonetheless, the Fifth Circuit affirmed the award of summary judgment, holding:

> We agree with the district court that if this case were against the Army, those regulations may be pertinent. However, Roberts has sued the Bank. Even if the Army assumed greater responsibilities than the RFPA requires, the Bank is not deprived of the right to rely on the exemption Congress created in Section [12 U.S.C. §] 3413(e).

*Id.* (emphasis added). The Fifth Circuit's ruling essentially sets forth a financial institutions' right to rely a subpoena that purports to be proper, irrespective of the Army's conduct in issuing the subpoena.

In *Ismail v. Old Kent Bank & Trust Co.*, 893 F.2d 1334 (6th Cir. 1990), *certiorari denied*, 493 U.S. 962 (1990), the Sixth Circuit was presented with an appeal of summary judgment awarded pursuant to 12 U.S.C. § 3413(e). The bank customer argued that summary judgment should not have been awarded in favor of the financial institution as the subpoena was "unenforceable because they were issued by an assistant United States attorney without judicial approval." *Id.* In other words, plaintiff argued that the subpoenas were defective as they did not comply with the rules of procedure. The Sixth Circuit found that the subpoenas had been properly issued by the court upon application by the U.S. attorney. *Id.* However, the Sixth Circuit went on to say "Moreover, even if the subpoenas were somehow defective, the bank would still not be civilly liable if there was a good faith reliance on the subpoenas." *Id.* (emphasis added). Affirming the lower court's award of summary judgment, the Sixth Circuit, like the Fifth Circuit, applied a standard to RFPA claims and 12 U.S.C. § 3413(e) defenses, which looks to the face of subpoena and the financial institution's state of mind, rather than

the conduct of the government or procedural propriety of the subpoena.

Like the decision in *Roberts* and the circumstances discussed in *Ismail,* the Court of Appeals here affirmed an award of summary judgment in favor of FJFCU pursuant to 12 U.S.C. § 3413(e) because the subpoena facially "satisfies[d]...12 USC § 3413(e)." (Pet.App. 5a). The FJFCU subpoena clearly identifies that the subpoena was issued in relation of a "General court-martial" and that "Failure to appear...is punishable by a fine...or imprisonment...10 U.S.C. § 847... [and] may...result in...being taken into custody and brought before the court-martial...Manual for Court Martial R.C.M. 708(e)(2)(G)." (Pet.App. 65a; CR 443; CR 376, Exhibit "B"). Although "[t]he deposition testimony of Major Ohlweiler...indicates the Fort Jackson FCU subpoena contained erroneous language..., there is no evidence that anyone from Fort Jackson FCU knew (or had reason to know) that the documents were, at that point anyway, for an Article 32 hearing rather than for a General Court-Martial." (Pet.App. 65a; CR 443).

The Court of Appeals here also affirmed the District Court's two decisions barring re-deposition of Army witnesses, in a manner consistent with the decisions in *Roberts* and *Ismail.* (Pet.App. 6a). As stated above, the courts in *Roberts* and *Ismail,* essentially held that the government's conduct and the procedural propriety of the subpoena are irrelevant to RFPA claims against a financial institution. Here, the District Court first reversed the Magistrate's discovery order in so far as it permitted re-deposition of Army witnesses, finding that "the testimony of the Army witnesses is irrelevant" to the remaining claims against FJFCU and FHB. (Pet.App. 97a; CR 388). The District Court next denied the Flowers' Rule 56(f) Motion to re-depose of Army witnesses, based in part on the conclusion that "there has been no showing that further discovery could lead to a different conclusion" regarding the RFPA claims against FJFCU. (Pet.App. 61a; CR 443). Essentially, the District Court's decisions to bar the re-deposition of Army witnesses, in both instances, were based on its finding that the Army's conduct and the propriety of the FJFCU subpoena are

irrelevant to the RFPA claims against FJFCU, as well as the FJFCU's 12 U.S.C. § 3413(e) defense to the RFPA.

Accordingly, there is no conflict between the Court of Appeals' decision to affirm summary judgment in favor of FJFCU and deny re-deposition of Army witnesses, and the decisions of other federal appellate courts or state courts of last resort. As such, there is no compelling reason to grant review of the decisions attributable to FJFCU.

### III. The Flowers Make No Argument That There Has Been a Departure From the Accepted And Usual Course of Judicial Proceedings As To Decisions Attributable to Fort Jackson Federal Credit Union

The Flowers make no argument or showing that the Court of Appeals has either so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court with respect to decisions attributable to FJFCU, so as to call for an exercise of this Court's supervisory power.

In fact, this Court has previously declined to exercise its supervisory power, when presented with points on appeal identical to those raised against FJFCU here. As discussed above, the case of *Roberts,* 226 F.3d 374 (5th 2000), involved the appeal of summary judgment on RFPA claims awarded in favor of the financial institution. The Fifth Circuit affirmed the lower court's award of summary judgment, holding that the Army's failure to comply with its own rules governing the subpoena, was irrelevant to the financial institution's right to rely on the RFPA exception in 12 U.S.C. § 3413(e). *Id.*, at 376. On petition for writ of certiorari, this Court denied review. *Roberts v. Sabine State Bank & Trust Co.,* 532 U.S. 909 (2001).

In the instant case, the Flowers seek this Court's review of summary judgment on RFPA claims in favor of FJFCU. The Flowers' primary contentions are that the Court of Appeals erred in affirming summary judgment as (1) the FJFCU subpoena was procedurally defective, and (2) that the Flowers should have been

permitted to present evidence of said procedural flaws. Like this Court's decision in *Roberts,* 532 U.S. 909, this Court should decline to exercise its supervisory power for absence of departure from the accepted and usual course of judicial proceedings.

## CONCLUSION

Based on the foregoing reasons, FJFCU respectfully submits that the Flowers' Petition for Writ of Certiorari should be denied as to decisions attributable to FJFCU.

Respectfully submitted,

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April 2007

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 01-00412 SPK-KSC
CIVIL NO. 99-00335 SPK-KSC

ORDER RE DISCOVERY

[FILED SEPTEMBER 11, 2003]

MARSHALL KENNETH FLOWERS )
)
Plaintiff, )
)
vs. )
)
DEPARTMENT OF THE ARMY, )
25TH INFANTRY DIVISION (L) )
and FORT JACKSON FEDERAL )
CREDIT UNION, )
)
Defendants. )
_____ )
)
MARSHALL KENNETH FLOWERS, )
and ANNA FLOWERS, )
)
Plaintiffs, )
)
vs. )
)
UNITED STATES DEPARTMENT OF )
THE ARMY; and FIRST HAWAIIAN )
BANK, )
)
Defendants. )
_____ )



**APPENDIX "A"**

Before the court is a discovery dispute regarding the taking of depositions of certain United States Army ("Army") and Fort Jackson Federal Credit Union ("Fort Jackson") witnesses. Letter briefs were filed by the parties on August 22 and 26, 2003. The matter came on for a status conference on September 9,2003. Plaintiffs Marshall K. Flowers ("Mr. Flowers") and Anna Flowers ("Plaintiffs") appeared pro se. Jeffre Juliano, Esq. appeared for defendant Fort Jackson; Patsy Kirio, Esq. for defendant First Hawaiian Bank; and Theodore Meeker, Esq. for defendant Army.

Plaintiffs seek the renewed opportunity to depose Fort Jackson witnesses Velma Jones and Kenneth Creticos, and Army witnesses General Hill, Major Ohlweiler and Major Bagwell (collectively witnesses").

Originally, Plaintiffs' former counsel, Charles Brown, Esq. ("Brown"), and defense counsel agreed on the week of July 21, 2003 for the taking of the depositions of the above-named witnesses. As late as July 17, 2003, attorney Brown confirmed the dates of the depositions. Fort Jackson noticed the depositions of the three Army witnesses and the Army noticed the depositions of the two Fort Jackson witnesses. However, apparently Mr. Flowers was predisposed on the dates of the depositions and apparently due to his insistence that he be present for the depositions, neither he nor counsel appeared at any of the depositions which were taken on the mainland as noticed. Plaintiffs did not file a protective order to prevent the depositions from going forward. Neither did they bring any related discovery dispute before this court in a timely fashion.

Nevertheless, due to Plaintiffs' *now pro se* status as well as considerations of fundamental fairness, the court hereby orders that Plaintiffs are granted leave to take depositions of the above-named witnesses on the following terms and conditions.

First, the above-named witnesses shall make themselves available for deposition in their respective resident cities at times and dates agreed to by all of the parties. Second, the depositions of all five witnesses must be completed on or before November 30, 2003. Third, unless otherwise enlarged by the court, the duration of each deposition shall be limited to two hours. Fourth, in order to mitigate the financial

burden to defendants resulting from Plaintiffs' non-appearance at the completed depositions of the above-named witnesses, Plaintiffs must reimburse defendants Army and Fort Jackson an amount equal to one-half of the reasonable travel and lodging expenses incurred by defendants resulting from their attorneys having to attend the depositions of the above-named witnesses on the mainland, if any. Finally, the depositions of the witnesses may be taken by telephone or by video teleconference.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii: SEP 11 2003.

/S/ Kevin S.C. Chang
Kevin S.C. Chang
United States Magistrate Judge

CIVIL NO. 01-00412 SPK-KSC MARSHALL KENNETH FLOWERS vs. DEPARTMENT OF ARMY, et. al.; CIVIL NO. 99-00335 SPK-KSC; ORDER RE DISCOVERY

No. 06-819

*Supreme Court of the United States*

---

Marshall K. Flowers and Anna Flowers,

Petitioners,

v.

United States Army, 25TH Infantry Division; Fort Jackson Federal Credit Union, First Hawaiian Bank; United States of America; Secretary Of the Army, Thomas E. White, and John D. Ohlweiler, Major

Respondents.

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Petitioner's Marshall K. Flowers Application for Justice Anthony Kennedy or the Court to Review Respondents' Application to Extend the Time to File a Response Brief Due on March 7, 2007 to Petitioner's Writ of Certiorari and Request to File a Single Reply Brief Under Three Separate Sections

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To the U.S Supreme Court or the Honorable Justice Anthony Kennedy:

Pursuant to Rule 30.4, Rules of the United States Supreme Court, Petitioner Marshall K. Flowers request the Honorable Justice Kennedy or the Court reconsider the clerk granting of respondents United States, Fort Jackson Federal Credit Union, and First Hawaiian Bank an extension to submit a response as directed by the Court until April 7, 2007. Petitioner's support for review is as follows:

On December 8, 2006 Petitioners submitted to this Honorable Court a Petition for Writ of Certiorari in the above-entitled case that placed before the Court the question "[w]hether Feres v. United



**APPENDIX "B"**

States, 340 U.S. 135 (1950) bars Petitioner's claim under the Right to Financial Privacy Act as affirmed by United States Court of Appeals for the Ninth Circuit.

On January 5, 2007 the Court entered the waiver of respondent Fort Jackson Federal Credit Union; on January 10, 2007 the wavier of respondent First Hawaiian Bank, and on January 11, 2007 the waiver for respondent United States.

On February 5, 2007 the Honorable Court requested a response from respondents to be filed with the Court no later than March 7, 2007. Petitioners received waivers (signed) from respondents Fort Jackson Federal Credit Union and First Hawaiian Bank but notified the Court of non-receipt of a signed waiver from the Solicitor General representing the United States and submitted to all parties as required by the rule. Rule 29 states that

> proof of service shall accompany the document when presented to the clerk for filing and should be separate from it. Proof of service shall contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of names, addresses, and telephone numbers of counsel indicating the names of the parties each counsel represents. Proof of service may consist of.. .(a) an acknowledgement of service, signed by counsel of record for the party served, and bearing the address and telephone number of each counsel.

Rule 29, Rules of the United States Supreme Court

On or about February 16, 2007 Petitioner received an application with proof of service from both Fort Jackson Federal Credit Union and First Hawaiian Bank requesting the clerk of the court grant an extension to file their response as requested by the Court to and including April 6, 2007. Petitioners did not receive an application for an extension or proof of service from the Solicitor General or authorized representative of the United States.

On February 21, 2006 Petitioner received in the U.S. Mail the Chief Deputy Clerk, Mr. Christopher W. Vasil approval stated as

follows:

> Dear Ms. Tang:
>
> Your response of February 15, 2007, for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted; **the time has been extended to and including April 6, 2007, for all respondents.**

Argument

Petitioner has not received an application for an extension from the Solicitor General or his authorized representative and respectfully believes Mr. Vasil granting of an extension in absence of an application is unwarranted and contrary to the rules. Additionally, Petitioner believes that respondents Fort Jackson Federal Credit Union and First Hawaiian Bank's application for an extension is unjustifiable, unwarranted, and even more dilatory delay tactics.

Respectfully, if the Honorable Justice Kennedy or the Court deems respondents application for an extension justifiable. Petitioner request Justice Kennedy or the court reconsider and shorten the length of time. Further, if the Solicitor General has submitted an application for an extension to the Court, respectfully request the Court direct that the Solicitor General or his authorized representative mail petitioner and all parties a copy of the application to include proof of service.

Lastly and respectfully, Petitioner request that their reply brief to respondents' opposition the Court allow a singe reply brief in separate sections that address each respondent response thereby increasing the page limitation to 30 pages (10 pages each for each section, respondents). If the Court deems this request in non-compliance with the Court rules, petitioner will prepare the reply

brief as determined by the rules of this Honorable Court.

## Conclusion

Respectfully, Petitioner request Justice Kennedy or this Honorable Court reconsider the Order of the clerk granting respondents Fort Jackson Federal Credit Union and First Hawaiian Bank until April 7, 2007 to respond and the Court respectfully determined if the Solicitor General should have been granted an extension in absence of an application requesting an extension or petitioner's non-receipt. Further, that the court grant petitioner's request to reply to respondents under a single copy reply brief (tan) with three section and page limitation of thirty pages (10 pages limited for each respondent)

Respectfully submitted,
02-23-2007
/S/ Marshall K. Flowers
P.O. Box 29632
Honolulu, Hawaii 96820
1 808 256-2279

Petitioner-Pro Se

Certificate of Service

I, Marshall K. Flowers, hereby certify under penalty of perjury, under the laws of the United States of America that the following document(s):

> Petitioner's Marshall K. Flowers Application for Justice Anthony Kennedy or the Court to Review Respondents' Application to Extend the Time to File a Response Brief Due on March 7, 2007 to Petitioner's Writ of Certiorari and Request to File a Single Reply Brief Under Three Separate Sections

was/were served by placing a true and correct copy of the said document(s) in the United States mail by: ( X ) First Class ( X ) * Denotes Personal Service (Hand Delivery) ( + ) Other Overseas Airmail

TO:

Office of the Solicitor General
950 Pennsylvania Avenue, Room 5614
Washington, D.C. 20530-0001

---

U.S. Department of Justice, Appellate Staff
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---

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6

No. 06-819

FILED
APR 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

MARSHALL K. FLOWERS and ANNA FLOWERS,

*Petitioners,*

v.

UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHLWEILER, Captain,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONERS MARSHALL K. FLOWERS AND ANNA FLOWERS' REPLY BRIEF TO RESPONDENT FORT JACKSON FEDERAL CREDIT UNION

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# REPLY BRIEF FOR THE PETITIONERS

## I. Statutory Scheme

Under the RFPA, a government authority may not obtain a bank customer's financial records unless the records are reasonably described and 1) the customer has authorized the disclosure; 2) the disclosure is in response to an administrative summons; 3) the disclosure is pursuant to a search warrant; 4) the disclosure is in response to a judicial subpoena; or 5) the disclosure is in response to a formal written request. See 12 U.S.C. § 3402. However, 12 U.S.C. §§ 3413(e) and (1) provide for exceptions to the disclosure requirements of § 3402 when the records sought are in connection with litigation between the government and the bank customer, or when the records are sought under a subpoena or court order issued in connection with judicial proceeding.

Respondent Fort Jackson Federal Credit Union ("FJFCU") defense under the statutory scheme as it pertains to 12 U.S.C.§ 3413(e) is non-applicable and if accepted set a dangerous precedents for financial institutions' scope of liability and stage unaccountability pursuant to law. Disregarding the plain statutory text, FJFCU sought to capitalize on its standing with the Army, chance its violation and accountability to the law, placing its own interest above that of the service member. The standards and procedures prescribe by the RFPA that both the financial institution and Government authority must follow when subpoenaing and releasing customer's records must be enforceable and all accountable to wording of the law. See RFPA 3401et. Seq. Pet. App. 98a-113a

Respondent FJFCU's defense for releasing Petitioners financial records to the Army is a classical example the credit union's non-training and failures to establish RFPA safeguards into its management activities. Now the question is of accountability. Should FJFCU be exempt from RFPA liability pursuant to § 3413(e) for its procedural flaws in acceptance of a subpoena and releasing the Flowers financial records based upon a faxed unauthorized subpoena? The answer invariably is in the

negative. The basis for FJFCU defense cannot rest upon a scheme that discriminately chips away accountability. The Court should not accept FJFCU ignorance of the law. The exception clause 12 U.S.C. § 3413(e) states:

> Nothing in this title shall apply when financial records are sought by a government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties. (emphasis added)

This exception cannot become fuel (exceptions) for vehicles (banks and credit unions) that drive violators to crash with the law. Though military law comes under a different set of rules than civilian counterparts, it is no less accountable to promulgated laws and regulations it chooses to implement. The comparable rules of other court (military) with regard to RFPA and subpoenas are found in 32 Code of Federal Regulations ("CFR") §§ 275 and 504 (Pet.App. 114a-118a; 118a-141a)("No access to any financial records will be made before such certification is given")(emphasis added); Manual for Courts-Martial, R.C.M 703 (1995); and Army Regulation ("AR") 190-6- Obtaining Financial Information from Financial Institutions (A certificate of compliance with the Right to Financial Privacy Act of 1978 (App C) will be provided to the financial institution as a prerequisite to obtaining a customers financial records under the following access procedures: © Judicial Subpoenas (para 2-5)(emphasis added) Pet. App. 142a-161a.

Most importantly though nonapplicable here, FJFCU looks to and cites the Ninth Circuit's four part test for determining exception under of 12U.S.C. 3413(e) as the court outlined in Flowers v. First Hawaiian Bank, 295 F.3d 966, 971 (9th Cir. 2002). If this Court accepts the Ninth Circuit analogy as applicable in the instant petition for certiorari, the four-part test invalidates the Code of Federal Regulation, §§ 275 and 504, Department of Defense Directives 5400.12 and Army regulations setting forth safeguards from invasive and illegal tactics used by the government to obtain service members financial records. The word will requires the

government to provide the financial institution with a certificate of compliance before releasing financial record to the Army, this requirement counters illegal methods construed by the government.

II. Factual Background

Respectfully, Petitioners disagree with respondent description of the events as succinctly summarized by the District Court for the District of Hawaii, in its order Granting In Part and Denying In Part Motions for Summary Judgment (see Pet. App. 63a-69a; CR 443. Rather that submit redundant information in each reply brief, Petitioners factual background is fully described in Petitioners' Reply Brief in response to the U.S. Army.

The undisputed factual background in the complaint is Flowers was detained for an alleged shoplifting at the Schofield Exchange. Thereafter, the Army through the behaviors and actions of Maj. Ohlweiler engaged in despicable and unacceptable, conduct from investigation of charges, non- judicial punishment, and though charges were unsupported under any standard of rules pursuant to the manual, Maj. Ohlweiler as a last resort use a withdrawn non-judicial punishment (Article 15) as the basis for a bar-to-reenlistment, ultimately as he phased it "to Flowers go away" that eventually force Flowers into retirement.

Most essential to military discipline is fair-play and equitable treatment of service members and strict adherence to the principles of law. Rule 109 of the Manual for Courts-Martial unequivocally states that:

> Each judge advocate is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with the rules of this manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violation

of such rules. Sanctions may include but are not limited to indefinite suspension from practice in court-martials..."

FJFCU's brief does legitimately defend nor provide any law, statutory or precedents why this Court should not review the Right to Financial Privacy Act and determine whether summary judgment is appropriate in this case, absent their ability to conduct discovery, denial of their Federal Rules of Civil Procedure, Rule 56(f) motion, and clarification of whether the RFPA is barred by Feres and whether its enforcement mechanism interferes with military discipline? Rather instead, respondents ask this Court to punish petitioners for attempting to execute the penalty provision for its violations of the RFPA that contributed to, if not cause Flowers' dismissal from the Army.

FJFCU had the ball (law on its side, "get a certificate of compliance") fumbled it (violated the law) and now ask management (this Honorable Court) for a contract extension (exception § 3413(e)).

III. Petitioners Statement of Procedural Background

Procedurally, Petitioners were continuously denied due process in litigating their claims against the powerful defendants with resources, positions, and compromise of standards not condoned by the standards the judiciary expects from its officers. First, the Army had twofold interest in barring Flowers from reenlistment 1) for Maj. Ohlweiler' violation of the RFPA and retaliation for the civil suit filed against First Hawaiian Bank, and 2) to deny a court-martial and due process. It was not about military discipline, it was utilization of status, positions, to underscore the violation of rights afforded pursuant to our Constitution of these United States that the Army though Flowers was worthy to defend however, deprive Flowers from utilizing that right, that in violation of the Fourteenth Amendment.

FJFCU mistakenly states that "[o]n April 24, 2003, the Flowers jointly filed the second Consolidated Amended Complaint ...[.] (CR 222) 'This was the first time Mrs. Flowers had properly

brought suit against FJFCU.'" Petitioners Second Consolidated Amended Complaint was filed by Petitioner's counsel, Charles R. Brown on March 28, 2003 (CR 211)

Additionally, FJFCU's response brief ("Br. Resp. FJ) incorrectly states that "[t]he Article 15 hearing was held on August 28, 1998. 'Flowers and military defense counsel attended.'" Br. Resp. FJ at 9. Pursuant to military regulation, Flowers was assigned Individual Military Counsel, Maj. Denise Lind ("Maj. Lind") who departed Hawaii for graduate school in mid-July 1998. Flowers consented to no other military representation in the case except consent to have Capt. Donna M. Bovina as assistance defense counsel. However, her presence did not exist at the Article 32 hearing.

IV. Petitioners' Counter Argument

FJFCU refers to Rule 10 of the Supreme Court Rules stating "it is clear that the Flowers have not raised issues of character necessary for review by the United States Supreme Court. Clearly, Flowers raised eleven questions before the Ninth Circuit Court of Appeal that the Court mostly dismissed as without merit. Pet. App. 1a-7a.

The Court of Appeal decided the Issues of Feres, which advertently prohibited discovery and restricted the Flowers ability to litigate their claims. See Feres v. United States, 340 U.S. 135 (1990).

Collectively, the defendants capitalized on Maj. Ohlweiler's positions as SAUSA and created disarray for petitioners by ignoring compliance with Rule 26 of the Federal Rule if Civil Procedure, particularly with regard to initial disclosures that requires a party without awaiting a discovery request, provide to other parties: (A) the names and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleading, identifying the subjects of the information; (B) A copy of, or a description by category of all documents, data compilation, and tangible things in possession, custody, or control of the party that are relevant to disputed facts alleged with

particularity in the pleading. FRCP, Rule 26.

The adversary system provides both sides in litigation with opportunity to present facts and evidence in support of their claim and based upon those facts and evidence, the court can render its decision. Facts and evidence are acquired through discovery. Feres deprived Petitioners of the right to obtain facts and evidence with regard to defendants' violations of the RFPA. Petitioners requested discovery as early as November 27, 2002 which the court denied (CR 101/124) See also Fort Jackson Amended disclosure [CR 295/317]. Although, the Government deposed Anna and Flowers for eight and twelve hours on April 27, 2003 and May 29, 2003 respectively, the government and defendant financial institutions thwarted and manipulated the discovery process and used the court as its vehicle to drive "Flowers away" .

Petitioners' litigation the U.S. District Court for District of Hawaii spelled disaster for Petitioners- particularly pro-se after the Ninth Circuit Court decision in Flowers v. First Hawaiian Bank, 295 F.3d 995 (9th Cir. 2002). The rules of law were not equitable. The eleven questions petitioners proposed to the appeals Court could not be presented to this court in a short petition for certiorari. Additionally and respectfully, the Department of Justice appeared to improperly influence the selection and assignment of Petitioners appeal to a favorable panel. Nevertheless, the decision conflicts with law and decisions of other courts. Indeed higher echelon personnel engaged in behavior unacceptable to this Court. Respectfully, the Ninth Circuit states "[t]he record shows that the Flowers failed to produce or cite any evidence to establish a genuine issue of material fact sufficient to overcome summary judgment. The record establishes that the credit union is not liable under the RFPA because the subpoena issued to the credit union satisfies an exception to liability under 12 U.S.C. 3413(e). Pet. App. 5a

IV. The Ninth Circuit Court Four Part Test is non-applicable to events and unlawful subpoena in the instant appeal.

Respectfully, the Ninth Circuit Court decision incorrectly applied its application of the four-part test to the subpoena issued

FJFCU in this case. The court stated "[t]he four part test all of which must be met to apply; the applicable financial records must be (1)sought by a government authority, (2) under the Federal Rules of civil or Criminal Procedure or comparable rules of other courts, (3) in connection with litigation, (4) to which the governmental authority and the customer are parties

In applying the four-part test to the subpoena issued by Maj. Ohlweiler, the only shoe that fits is 1) Maj. Ohlweiler, a military officer meets the definition of "Government authority." The other three of the four-part test are non-applicable and absent to FJFCU's defense. Particularly for reasons as followed:

(2) under the Federal Rules of civil or Criminal Procedure or comparable rules of other courts. This part cannot apply since the Maj. Ohlweiler was absent authority to issue a subpoena. see 32 CFR, part 504.2(c) ("The Army has no authority to issue administrative summons or subpoena for access for financial records");see also R.C.M.703 © ("A subpoena may be issued by the summary court-martial to secure witnesses or evidence for that court-martial") (3) in connection with litigation: Blacks Law define "Litigation" a lawsuit, legal action, including all proceeding therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest, a judicial controversy, a suit at law- this part definitely cannot meet the criteria since a court-martial was not convened pursuant to Rule 601 (Referral of charges I the order of a convening authority that charges against an accused will be tried by a specified court-martial. Rule 601 see also 601 discussion ("Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (see R.C.M. 601(b) and ©; preferred charges which have been received by the convening authority for disposition (see R.C.M 307 as to the preferral of charges and chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (see R.C.M. 504); (4) to which he governmental authority and the customer are parties: the investigative stage of a proceeding between an accused and the government absent a case, controversy, or lawsuit in a Court is absent.

The second question remains "[h]ow was Fort Jackson Federal Credit Union, located on a military base in South Carolina to know that a subpoena issued from Hawaii to its credit union is facially valid"? Respondent argues "[f]acially,...the[FJFCU] subpoena was one that fits within the exception [to the RFPA]. There was no way Fort Jackson FCU would have, or should have, known that the underlying proceeding had not yet reached a court-martial stage. As a customer of FJFCU for years, an attempt over the telephone for Flowers withdraw funds from either accounts required answer to questions, mother's maiden name, social security number and other security measures before funds or information. Of course, security measures are enacted or should be enacted to protect both the bank nd the customer's interest. Nevertheless, security measures are implemented.

FJFCU did not request a certificate on compliance nor waited for the 10-14 days as required before providing financial records. See § 3410. Instead, Ms. Jones, an executive secretary in the management division "acted on a faxed copy."

While Petitioners objected to FJFCU's counsel, Mr. Jeffere Juliano representation of all FJFCU employees (witnesses), the following transpired at the deposition of Ms. Velma Jones.

In a sworn deposition to Petitioner's questioned Ms. Velma Jones answered as follows:

Q. So that there is no record custodian, as you testified today?

A. Not that I know of, no

Q. During the period of June 1998, you received a subpoena; is that correct"

A. Yes.

Q. And who did you receive the subpoena from?

A. Captain Ohlweiler?

A. How did you come to know Captain Ohlweiler?
Q. To know him, I received a telephone call from him stating that he had a subpoena for records of your account.

Q. Yes. And go on.
A. You asked me how--

Mr. Juliano: Wait, objection. Ms. Jones, I don't want you to just keep going, answering his question. Answer the question. Ms. Jones, if you have finished answering his question, then tell him you've finished answering his question. He's just going to ask you to go on. There is no question pending, so I object to the form of the question. There is no question pending

Mr.Flowers: Mr. Juliano

Mr. Juliano: I don't want you to get into just a broad--

Mr. Juliano: Ask your question. I just don't want you asking broad-
By Mr. Flowers

Q. Okay. And you indicate, in your last remark you indicated that he gave you a telephone call and he requested financial records for who?
A. Marshall K. Flowers

Q. And in requesting those financial records, did he indicate why he wanted those financial records?
A. That it was for a court martial

Q. And he indicated it was for a court martial and what was your response?
A. I responded to him as I would normally with anyone requesting a subpoena, and that would be that I would normally require the original subpoena before I can release any document. However, he indiated that it was--needed as soon as possible, and I would act on a fax copy if he sent that to me.

Q. And when did you receive--did you receive the subpoena when he--you indicated you receive a faxed copy?

A. Yes

Q. Is that your testimony?
A. Yes. I received a fax copy, but, as I said, I would normally wait until I received the original subpoena. But because he did say that it was due as soon as possible, I would accept a fax copy and I would prepare the documents to send out. And not having any problems with the Army ever sending an original to me, I acted on the copy, or the fax, I'm sorry. (emphasis added) CR 423

Further Ms. Jones testified that Flowers financial records were placed in regular mail. Though strange as it seems, Maj. Ohlweiler needed the records in a hurry but Ms. Jones as alleged sent the records regular mail. FJFCU compromised discovery be failing to provide proper document[1] Ms. Jones did not sign the subpoena or deliver records as ordered by the subpoena, nor render fees for copying. Fort Jackson allegedly certified copies were not properly certified or notarized. In other words the only notary's signature (Kenneth Credicos) signature appeared with words "[m]y commission Expires May 12, 2003." Noteworthy, the notary is not in accordance with laws of the state of South Carolina. Maj. Ohlweiler alleged letter attached to the subpoena (Rule 703(d) governs service of a subpoena)[2] states "while I need certified, hard copies of the records, if it is possible, I would appreciate if you could fax the paperwork to me as well." CR 432.
R.C.M. 703(D) discussion, addressing informal and formal service states:

> Informal service- *unless formal service is advisable, the person who issued the subpoena may mail it to the witness*

---

[1] Purusant to a discovery request FJFCU provided bate stamped (J00040-44) copies of Flowers' financial statements rather than allegedly certified copies of record Flowers found in the binder at the second Article 32 hearing on or about November 25, 1998. CR 423. Additionally, FJFCU compromised responses to interrogatories with failing to "Identify" Kenneth Credicos. See allegedly certified records, Exhibit "D" at CR 423.

[2] Service shall be made by delivering a copy of the subpoena to the person named and be tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned. R.C.M. 703 (D)

*in duplication, enclosing a postage-paid envelop bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelop provided. The return envelop should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness to fees and mileage will not be impaired by voluntary compliance with the request and a voucher for fees and mileage will be delivered to the witness promptly on being discharge from attendance.*

*Formal service-Formal service is advisable whenever it is anticipate that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. See Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when that person is in the vicinity.*

R.C.M. 703(D) Discussion

FJFCU's response brief ("Br. Resp. FJ) argues and relies specifically on §3413(e) as good faith defense for non-compliance with procedures, the subpoena language "a General court-martial of the United States…appointed by MG James T. Hill to provide evidence in the matter of United States v. SGM Marshall K. Flowers…Failure to appear…is punishable by a fine…or custody…" Br. Resp. FJ at 3. It is undisputed the language of the RFPA protects a financial institution's protection from liability when litigants are in court. In spite of that the bank is not exempted from the procedural requirement or ignorance of Army regulation for service of process. The language on face of the subpoena clearly described what the recipient must conform to.

Also undisputed is the document issued Fort Jackson a Department of Defense (DoD) document, DD Form 453 (Aug 84)

titled "[s]ubpoena." [3] The law that governs subpoenas is found in Manual for Courts-Martial, Rule 703- Production of witnesses and evidence.

The unauthorized subpoena allegedly issued FJFCU states as follows:

> The President of the United States, to Velma Jones, Fort Jackson Federal Credit Union you are hereby summoned and required to provide on the 24th day of June, 1998 at OSJA, 25th ID(L)(see attached letter for address) (a General court-martial of the United States)(a court of inquiry), appointed by MG James T. Hill to provide evidence in the matter of United States v. SGM Marshall K. Flowers all bank account information since 1 Jan 97 , to include #58293.
>
> Failure to appear and testify is punishable be a fine of no more than $500.00 or imprisonment for a period not more than six months, or both. 10 U.S.C. 847. Failure to appear may also result in your being taken into custody and brought before the court-martial (_____) under R.C.M. 708(e)(2)(G).
>
> Bring this subpoena with you and do not depart from the proceeding without proper permission.
>
> Subscribed at Schofield Barracks, this 24 day of June 1998.
>
> _____
> John N. Ohlweiler
>
> The witness is hereby requested to sign one copy of this subpoena and to return the signed copy to the

[3] The standard pre-printed DD Form 453 states " failure to appear and testify is punishable by a fine of not more than $500 or imprisonment for a period not more than six months or both. 10 U.S.C § 847.

person serving the subpoena.

I hereby accept service of the above subpoena

_____

Signature of witness

Note: If the witness does not sign, complete the following.

CR at 432 See also AR 27-10, para 5-20 ("A subpoena must be sent certified first class mail, return receipt requested, and restricted delivery may be used for formal service of subpoenas (R.C.M. 703(e)(2) (D) and Discussion")

Despite complying with the subpoena, FJFCU relies heavily upon wording on face of the unauthorized subpoena and states:

> It is irrelevant whether the subpoena was, in fact, issued in the Article 32 proceeding when on its face, the subpoena that is actually issued clearly states that it is pursuant to a "General Court-Martial" ...Since FJFCU's subpoena states on its face that it is a subpoena in a "General Court Martial" , the subpoena does nort invoke non-existent legal authority as the basis for its issuance. In fact, a closer look at the June 24, 1998 subpoena directs the receiver[FJFCU] to look at R.C.M.708(e)(2)(G)" for legal authority regarding this particular subpoena. As indicated above, RCM 708(e)(2)(G)" clearly provides that asubpoena may be issued by a court-martial. Therefore, FJFCU had legal authority and a basis for responding to the subpoena

Sound good, but lacking substance since service of process, on the face of the subpoena, states: [t]he witness is requested to sign one copy of the subpoena and return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena

_____

Signature of witness

See subpoena DD form 453. CR 372

Respectfully to counsel their argument is not only procedurally defective but legally defective as well, an argument without merit and unpersuasive. FJFCU has the responsibility to establish, train, and implement RFPA safeguards to protect customer records in compliance with the law, advance measures FJFCU should have employed prior to this learning- through consequences.

In Petitioners opposition to FJFCU motion for summary judgment argues "there is no record of service of process that recorded the date the subpoena was served nor an official record of transmission...the method of service was unauthorized and record of transmission by fax not officially recorded. CR 422. The Government in its Amicus Brief to the Ninth Circuit court conceded the rules of Courts-martial "do not authorize a subpoena to produce documents except in conjunction with a witness appearance." (emphasis added) CR 423, App. J. While the rule provides for an inspection "at an earlier time" than the Court-martial trial, the authorization does not extend to the period before charges have been referred for court martial following completion of the investigation. Id.

Prior to and up to the date of the Article 32 hearing, Flowers was unaware Maj. Ohlweiler had issued unauthorized subpoenas for bank records, the two female civilian witnesses stood out since all attendees were in military uniform with the exception of Mr. Gittins. Maj. Lind certainly was aware of Maj. Ohlweiler's subpoena actions but failed to share information with Flowers. See Affidavit of Marshall K. Flowers in Oppos. To FJFCU motion for summary judgment ("[a]t the hearing, I overheard Maj. Lind say to either Charles Gittins or Capt. Graf "the financial records of SGM Flowers may reveal damaging information.") CR 425

Flowers is certain civilian bank representatives were in

attendance at the hearing noting Capt. Ohlweiler specific reference to Capt. Bagwell's arrival which demonstrated appearance of a court-martial to civilian unaware of the military justice system but complying with job instructions.("1034 the government requested the that CPT. Bagwell a Asst. trial counsel has arrived"). CR 372

In Flowers v. First Hawaiian Bank the court in its opinion expressed compassion for the "busy bank officer unschooled in military or federal law, examining the face of a subpoena would have difficulty deciding whether it was issued under the Federal Rules of Civil Procedure or comparable rules of other courts. 'All [the bank] had to do was obtain a certificate of compliance to the RFPA.' " Flowers v. First Hawaiian Bank, 295 F.3d 966, 975 (9th Cir. 2002). Here in the instant appeal, both financial institutions are located on military installations and comply with military rules, particularly in banking businesses. Perhaps the Court reasoning could be extended to the not so experienced bank employee unaware of the RFPA.

A financial institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to the financial institution that it has complied with applicable provisions of the chapter. See 12 U.S.C. 3403(b) Pet. App. 101a; see also 32 CFR, part 504.2(k)("A certificate of compliance with the Right to Financial Privacy Act of 1978 (app.c) will be provided to the financial institution as a prerequisite to obtaining access to financial records under the following access to financial records under the following access procedures: ...(3) Judicial subpoenas (504.2(e). See also AR 190-6, para 2-11 that echos the same language from 32CFR, part 504.2(k).

FJFCU cites the case of Mohammed Ismail, a pro se federal prisoner filed a civil complaint pursuant to the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 et seq. Ismail sued the defendant bank under 12 U.S.C. § 3417 alleging the bank violated his rights under the RFPA by improperly releasing his financial records to the Drug Enforcement Administration (DEA). The documents released were ultimately used to convict Ismail of

conspiracy to import heroin. The bank responded by stating that the RFPA was not violated because Ismail's records were only released pursuant to judicial subpoenas. The district court granted the defendant's motion for summary judgment finding that Ismail had not shown a genuine issue of fact regarding whether the RFPA was violated. On appeal, Ismail argues: 1) the subpoenas issued were unenforceable because they were issued without judicial approval; 2) the bank did not notify him that his financial records had been subpoenaed; and 3) the bank did not comply with 12 U.S.C. § 3420 which requires that the financial records obtained "shall be returned and actually presented to the grand jury".

The Ismail case bears no similarity to the Flowers case, Ismail alleged the defendant violated the RFPA by disclosing his financial records to the DEA prior to the issuance of the July 7, 1983 grand jury subpoena. Defendant's motion for summary judgment countered Ismail allegation with affidavits of DEA agent Richard Robins and Ivan Vander Kolk, vice-president of defendant bank. Both Robins and Vander Kolk stated that Ismail's financial records were only released after the bank received the July 7, 1983 grand jury subpoena. (emphasis added) Ismail responded by stating that the bank cooperated with the DEA prior to issuance of the subpoena. Ismail does not, however, support his allegation by any documentary evidence. The Court concluded that Ismail did not sustain his burden of producing evidence of a genuine issue of material fact for trial. See Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986); Davis v. Robbs, 794 F.2d 1129, 1130 (6th Cir.), cert. denied, 479 U.S. 992 (1986).

The Ismail Court found that the "subpoenas were issued by the court upon application by a U.S. attorney." Further, the decision stated " even if the subpoenas were somehow defective, the bank would still not be civilly liable if there was a good faith reliance on the subpoenas." See 12 U.S.C. § 3417(c). Also, under 12 U.S.C. § 3413(1), a financial institution is not required to notify its customer of the existence of a grand jury subpoena.

See Ismail v. Old Kent Bank & Trust Co., 893 F.2d 1334 (6th Cir.1990), certiorari denied, 493 U.S.962 (1990).

The subpoenas issued were unauthorized. According to Velma Jones deposition testimony her only training received pertaining to the Right to Financial to Privacy Act was "on the job training," basically learn as you go and through consequences as FJFCU seeks to renew its contract (seek the exception). See §3413 Clearly, the Credit union cannot be described as "the busy bank officer, unschooled in military or federal law as the Ninth Circuit Court referred to in Flowers v. First Hawaiian Bank. See Flowers, 295 F.3d at 975 (9th Cir. 2002).

This is not simply a matter where not only a particular rule was ignored but lack of training and Ms. Velma Jones release of financial records minus acceptance of process by signing and returning the Subpoena to Maj. Ohlweiler. Therefore absent service of process pursuant to rules of the court, FJFCU is a free agent (no exception and accountable to the law).

V. The Government and Defendants use of Feres as a conspiracy to deny discovery and "make Flowers go away.

Early July 2003 Flowers informed Attorney Charles R. Brown of a Court hearing in he First Circuit Court scheduled for either the 20-21 July 2003 and Petitioners would like to attend any and all depositions, particularly, when Mr. Brown fees increased each month and defendant sought to complicate discovery through failing to provided names and address of witnesses, protective orders to prevent petitioners pro se from interviewing bank employees, Maj. Ohlweiler presence and assignment in Hawaii as SAUSA, District of Hawaii whose deposition could have taken place but for the failure to comply with discovery. Maj. Timothy Ryan was also in Hawaii whose names and address were identified as a potential witness except for defendant disregard for the rules.

Each deposition to include spouse Anna Flowers, the Government conspired with Charles R. Brown to exclude Flowers.

Since December 1997, the lower court had prevented Petitioners from conducting discovery. Absent any doubt, Plaintiff were prevented from litigating through deceitful measures employed by combined efforts of defendants. As important information facts

regarding liability were provided Attorney Charles R. Brown, he sought a new contract to capitalize on this case, shared attorney-client information with defendant for self interest and compromised the litigation. Evidence of Mr. Brown's ethical violations are memorialized in two-volume of Hawaii Supreme Court, Office of Disciplinary Counsel that warranted and caused his suspension from the practice of law in March 2006 was warranted not only by Petitioners' claim but other as well is memorialized in two volume of record of misconduct.

On June 21, 2003 during the deposition of MG Hill the questions were put before regarding the appeal

Q. General Hill, why did you deny the appeal?
A. I denied the appeal because the original charges were sufficient to warrant the Article 15. In accepting the Article 15, he acknowledged guilt in the matter and accepted the punishment meeted out by the authority in this case, Col. Coleman. And what the appeal is for is to say that the punishment is too severe. I felt like the punishment was not severe against these charges

Q Sir, What effect, if any, did any financial records of Mr. Flowers have to do with your decision to approve the Article 15 punishment?
A. None whatsoever

Q. Now, General Hill, it is my understanding that the Army at this point in the proceeding against Mr. Flowers you had lived up to its part of the bargain"
A. We had indeed.

Q. In fact, the Army had dismissed the charges without prejudices against Mr. Flowers
A. We had indeed.

Q. In fact, the Army had pursuant to the agreement issued an Article 15 punishment which we just covered.
A. Correct

Q. Sir, do you know whether or not Mr. Flowers I had ended up--

had, I'm sorry, had lived up to his end of the bargain?
A. He did not

Q. As a result of that, do you know what you instructed your staff to do?
A. We put a bar to re-enlistment on him, we extended him on active duty--as I recall while he worked further appeals, and we initiated another Article 32 because we reconvened the charges.

Q. Okay. And why did you reconvene the charges.
A. Because part of the agreement was that he would accept the Article 32 and retire

Q. you mean accept the Article 15
A. And when he did not retire, then I negated, as I had the legal right to do, I negated the Article 15, initiated an Article 32 to reconvene general court-martial charges against him. CR 377

General Hill deposition testimony under Oath is assumed to be true. Though not subject to cross examination but he negated the Article 15 and started another Article 32 investigation for the purpose of court-martial. The denial of discovery and review of General Hill's deposition expresses the prejudices attributed to petitioners litigating their claims. Flowers has stated throughout the process-the choice was retire or face a court-martial and when Flowers chose to vindicate himself through court-martial, a bar to reenlistment denied due process and when Petitioners sought to litigate their claims that are the result of defendants violations of the RFPA, the defendants cut that short with Feres.

Defendants are not expected to be an adversary against themselves. Nonetheless, it cannot be permissible for them to manipulate independence of the judiciary. Feres as initiated is to deny discovery and absent complete and full discovery of federal defendant petitioners could not adequately respond to summary judgment and as a matter of law and § 3413 (e) exception was incorrectly decided in favor of Fort Jackson Federal Credit Union. The inability of Petitioners to equitable discovery through Feres deprived petitioners and the court with complete facts.

Additionally, petitioners respectfully placed before this court the court award of cost to FJFCU against petitioners, when in absence from the statue, the RFPA does not authorized compensation to the financial institution.

## VI. Conclusion

Respectfully, the decision of the lower court granting summary judgment and affirmation by the Ninth Circuit of appeals were in error. Therefore, the United States Supreme Court should deny FJFCU's opposition and grant Petitioners certiorari.

Respectfully submitted

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No. 06-819

# In The Supreme Court of the United States

MARSHALL K. FLOWERS and ANNA FLOWERS,

*Petitioners,*

v.

UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHLWEILER, Captain,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONERS MARSHALL K. FLOWERS AND ANNA FLOWERS' REPLY BRIEF TO RESPONDENT ~~FORT JACKSON~~ FEDERAL ~~CREDIT UNION~~

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**PETITIONERS MARSHALL K. AND ANNA FLOWERS REPLY BRIEF FOR.TO FEDERAL RESPONDENTS**

## 1. INTRODUCTION AND SUMMARY FACTS AND THE ARGUMENT

The Government, rather than address head on the substantial legal questions raised by this petition, the Government attempt to recast Petitioners' claims as nothing more than gripes about routine Army personnel decisions. *See Govt. Br.* 2. Respectfully, this malicious attempt to obstruct the Court's attention notwithstanding, the central question raised by this petition remains whether this Honorable Court should hear Petitioner's challenge as to whether the lower court was correct in applying Feres to dismiss their claim for the Army's violation of 12 U.S. C. 3401 et. Seq.,. the Right to Financial Privacy Act. Particularly, relevant is whether petitioner's RFPA claims are legally precluded or Feres used to excuse the Army's liability pursuant to RFPA and relevant statues and regulations; 32 CFR §§ 275 and 504 and AR 190-6 Obtaining Financial Information from Financial Institutions. The Government's brief (Govt. Br.) states that Petitioner alleges that "the Army conspired to press charges against Marshall Flowers, and thus constituted a willful violation of the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 et. Seq.". Govt. Br. at 2.

Respectfully, this statement mischaracterized the sequence of event that caused and contributed to Maj. Ohlweiler's issue of unauthorized subpoenas. But since truth requires revelation of facts, events, and evidence, the Government implication of Feres constitutes more so a denial of discovery than in this case interference with "military discipline." Clearly, as the petition sets forth, this case involves three separate defendants; the Department of the Army ("Army), Fort Jackson Federal Credit Union ("FJFCU"), and First Hawaiian Bank "FHB"). Each set of facts regarding subpoenas issued. Petitioners cooperated in all discovery matters. Defendants reigned free to conduct necessary

discovery; from Mr. And Mrs. Flowers deposing them for 14 and 8 hours respectively, to discovery of their tax records, and surprising not implicating "military discipline" when the financial institutions deposed military officers; General James Hill, Maj. John Ohlweiler, and Capt. Randy Ohlweiler.

The essence of these military officers' testimony to financial institutions involved "military discipline" testimony against SGM Flowers; except here "military discipline" is not implicated.

If the term "conspiracy" must be utilized as in the Gov. Opps. Br., it results from the conspiracy of defendants to deny petitioners safeguard of their financial records and contrary to law discriminates in application of law. The Government conspired with defendants utilizing Feres as a bar to litigating their claims. First, absent notice, the court allowed petitioners attorney to withdraw (CR 266), particularly and most importantly during the discovery period where and when the scheduling order provided for deadlines and after attorney with less than five month of representation cost more than $50,000.00 claimed in Attorney fee. The question before the Court appears from the Government perspective relates more so to military camouflage (conceal facts to blend in) than questions of "military discipline."

The fundamental question presented by this case is who gets to decide who is entitle to enforcement of the law? The Government brief failed to cite one allegation upon Ms. Flowers that encompass military discipline.

Questions raised before this Court are whether the lower Court contrary to law properly dismissed petitioners RFPA claims and whether the court was correct in granting summary judgment, in lieu of Petitioners Federal Rules of Civil Procedures,, Rule 56(f) motion to continue pending discovery and whether the lower court correctly applied Feres as precluding Petitioner from pursuing their claims? Whether the Army's violation of the RFPA implicates "military discipline? The Defendants offer no

arguments and present no substantial authority to justify service members in the District of Hawaii and in accordance with statutory law and regulation, the enforcement of the law when violated, particularly when the Army promulgates regulations but fail to follow them.

## II. THE FACTUAL BACKGROUND

Petitioners Marshall K. Flowers ("Flowers") and Anna Flowers ("Anna") (collectively referred to as "Petitioners") dispute some facts as alleged by the Government but reserving their continued objection to evidenced (CR 350/372) submitted in the lower court in support of First Hawaii Bank's ("FHB") Motion for Summary Judgment, also, and joined by FJFCU and as summarized by the U.S District court for the District of Hawaii, in its Order Granting In Part and Denying In Part Motion for Summary Judgment (see Pet. App. 63a-69a; CR443) and offered by Fort Jackson Federal Credit union in its response brief ("Br. Resp. FJ"), petitioners respond as follows:

It is undisputed Flowers was apprehended for alleged shoplifting at Schofield Exchange. Thereafter records, files, investigation reports, and evidence constructed misrepresented facts through improper acts (concealment of statements and exchange receipts; merchandise boxes absent contents obtained Navy Exchange, Pearl Harbor and sending boxes to CID laboratory for fingerprint identification; making a false affidavits in support of obtaining a search authorization; exceeding the scope of authority vested in the search authorization; seizure of the Flowers property; tampering with seized property by placing Barber's point price stickers on video films; Major Ohlweiler's improper influence in preferral of charges; impeding military justice through improper administration and assignment of military officer to render a partial Article 32 investigation report; unauthorized use of subpoenas to obtain financial records and its eventual cover up; the Army's failure to dismiss charges with prejudices; harassments, intimidation to force acceptance of non-

judicial punishment (Article 15), MG Hill withdrawal of Article 15 punishment and subsequent use of the withdrawal Article 15 as the basis for the Bar to Reenlistment; and
Maj. Ohlweilers' positions that made him unaccountable for his actions.

Unfortunately, the lower court suspended Petitioners right to equal treatment, elevated Maj. Ohlweiler to stature bigger than the law. Needless to say, no law is beneath man and no man is less accountable.

Petitioners reserved all rights to objection of Army's violation of their constitutional rights pursuant to the Fourth, fifth, and Fourteenth Amendment. First Hawaiian Bank receipt of and use prejudicial military records joined by FJFCU. (CR-95). Maj. Ohlweiler and 25th Infantry Division CID agents' campaign of unaccountability allowed obstruction of justice, concealment of sworn statements and evidence through exclusion from the blotter[1] and final CID Report. (CR 350/372) [2] Through concealment of evidence (exchange receipt), particularity Ms. Raymondi Kunasaki's statement, Sgt. Ebert's' omission and inclusion of false information caused a military judge in Fort Lewis, Washington to issue a search authorization for agents to enter and seize the Flowers personal property from their military quarters at 617 (B) Valley View Loop, AMR, Honolulu, Hawaii. The Flowers filed a motion in limine (Case #01cv412, CR-77) in the lower court to prevent prejudicial use of evidence obtained from the seizure.

In efforts to silence the Flowers regarding obstruction of justice and seizures of properties, Maj. Ohlweiler assignments as 25th Infantry Division Trial Services Office, Army Litigation Branch and Special Assistant to the U.S. Attorney ("SAUSA", State of Hawaii positioned him to improperly influenced the fair

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[1] A blotter report is military policy/ serious incident report provided commanders of incidents or serious activities of service members within a command within a twenty-four hour period.

[2] "CR" indicates the Court Record in the U.S. District Court and the numbers refer to the court docket number for both consolidated cases.

administration of justice through Capt. Joseph Hall, Commander, HHC 25th Infantry Division preferral of charges against Flowers for alleged violation of Article 121 (Larceny) and Article 81(Conspiracy), Uniform Code of Military Justice (UCMJ"); through a partial Article 32 hearing ("hearing" ) [3] as means to intimidate, harass, deny due process and force acceptance of non-judicial punishment and ultimately force Flowers' retirement; through litigation in the U.S. District Court for his use of unauthorized subpoenas to obtain the Flowers financial records in violation of Army Regulation and statue; and finally to deny discovery by using Feres v. United States, 340 U.S. 135 (1950). .

A. The Article 32 Hearing and Subsequent Article 15

It is undisputed an Article 32 hearing (hearing) convened on June 25-26 1998 attended by Charles R. Gittins [4] ("Mr. Gittins) who arrived in Hawaii from Virginia June 23, 1998. Prior to the hearing, Flowers encompassed and endured intimidation, harassment, prosecution and severe emotional depression as a result of the failure of command to investigate and military counsel, Maj. Denise Lind sober commitment to leaving Hawaii and attend graduate school than preparing to investigate and defend the charges; as defined by Maj. Ohlweiler "Make Flowers go away." The night before the scheduled hearing, Flowers professed innocence but agreed to accept disposition by non-judicial punishment and retire on conditions that the Army return his hard drive and property seized from military quarters; the Army discontinue its campaign of harassment and dismiss all charges with prejudices. Flowers signature appeared on a document titled "Memorandum of Agreement for Alternate

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[3] The primary purpose of the investigation required by Article 32 hearing is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. R.C.M 402 discussion.

[4] Mr. Gittins is a military attorney with residence in Virginia that defended military members around the world.

Disposition" ("MOA- 1),"(CR-350/372)[5] and according to counsel "collateral" but non-binding. Id. In relevant part the memo stated:

3. The Government shall withdraw with prejudices all charges against SGM Flowers upon imposition of Article 15, UCMJ Punishment. (emphasis added)

4. The government shall return to SGM Flowers all property seized from his quarters on 18 December 1998, with the exception of those items identified on the Government Bill of Particulars provided to the defense and two Casio Portable Televisions that were seized without batteries installed.

The General Court-martial convening Authority or no other signature appeared on the document, dated 26 Jun 98. Id.

Major Timothy Ryan, HHC 25th Infantry Division, G-1, presided over the hearing as Investigating Officer ("IO"). Parties in attendance are identified in the IO report.(CR-350/372). Other persons that attended the hearing but not identified in the report were Sgt. Francis McBride[6] and two civilian female witnesses that entered the hearing on June 25, 1998, several minutes prior to Capt. Ohlweiler's announcement, "let the record reflect that Capt.Bagwell, assistant trial counsel has arrived. IO Report, 16 Jul 98 Id. (ephasis added).

Prior to the hearing, unknown and absent notice to the Flowers as required by Right to Financial Privacy Act ("RFPA"), 12 U.S.C. 3407, Maj. Ohlweiler through an unauthorized process or subpoenas obtained the Flowers financial records. See 12, U.S.C. 3407. ("A Government authority may obtain financial

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[5] CR indicated the court record and document numbers for both cases First Hawaiian Bank, No. 99-00335 and Fort Jackson Federal Credit Union, No. 01-00412.

[6] Sgt. McBride during the course of the proceeding went by another unknown name but was the legal clerk for Maj. Denise Ling, the Trial Defense Officer in charge

records under section 3402(4) of this title pursuant to a judicial subpoena only if (1) such subpoena is authorized by law...(2) a copy of the subpoena has been served upon the customer or mailed to his last known address on or before the date on which the subpoena was served on the financial institution...[.]) (Pet. App. 103a) see also 32 Code of Federal Regulation, part 504((e) Judicial /subpoena ("The notice and challenge provision of 12 U.S.C 3407 and 3410 will be followed.) Id. at 125a

Flowers sensed something unusual about he hearing when Maj. Ohlweiler uttered words to the effect that "financial records on SGM Flowers may be damaging" and presence of civilian females as witnesses for reasons unknown. Most importantly, Col. Maschek was unaware and did forward charges to General-Court martial. The hearing was orchestrated by Maj. Ohlweiler as another method of intimidation. Finally came Government counsel utterance to Maj. Ryan "take your time finalizing the report, we've reached an agreement."

Flowers dated the MOA-1 prior to Mr. Gittins' departure on June 26, 1998 which he gave to Maj. Lind. Then Maj. Lind departed in mid-July 1998 for graduate schooling absent obtaining and providing a copy of the IO report, dated 16 Jul 98 to Flowers.

Flowers had not received the IO report but as instructed reported to Trial Defense Office where Capt. Graff gave Mr. Flowers a document titled "Government Offer to Dispose Charges by Article 15 UCMJ " that provided two choices; non-judicial punishment or General Court-martial. (CR 350/372). Mr. Flowers checked the block demanding trial by court-martial but Capt. Graff refused to recognize that right. See M.C..M. (1995) Part V-2. Then Capt. Graff consistently, from June 26, 1998 to August 28, 1998, informed Flowers that the MOA (if defined under Rule 705-though no General-court martial convening authority's signature appeared on the memorandum. Capt. Gaff consistently pressured

Flowers and insisted MOA-1 could not be terminated.[7]

As ordered on August 19, 1998, Flowers reported before LTC Halstead for reading of an Article 15 and there received a (1) signed MOA with LTC Halstead's signature, dated August 4, 1998, 2) (Admin. R. at 708) assumption of command orders for August 17-21, 1998 (Id. at 707, and 3) withdrawal and dismissal of charges. The Army failed to dismiss with prejudices 42 specifications of Larceny. (emphasis added)). No allied documents or evidence accompanied DA From 2627. See AR 27-10, ¶ 3-18 (The soldier will be provided a copy of DA Form 2627 and supporting documents and statements, for use during the proceeding) see also MCM, part V, 4c. (1)(D) (the service member shall be entitled to ...be allowed to examine documents or physical objects against the member which the non-judicial authority has examined in connection with the case and on which the non-judicial authority intends to rely in deciding whether and how much non-judicial punishment to impose.)

The charges were read. CR 350/372 [8] Flowers requested documentation and evidence to support the charges as read, LTC Rebecca Halstead replied "no other documentation was available,"

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[7] Manual for Courts-Martial, Rule 705 governs pretrial agreements with terms and conditions: (A) Not voluntary. A term or condition in a pre-trial agreement shall not be enforced if the accused did not freely and voluntarily agree to it. (B) Deprivation of certain rights. A term or condition in a pre-trial agreement shall not be enforced if it deprives the accuse of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court martial; the right to a speedy trial; the right to complete sentencing proceeding; the complete and effective exercise of post-trial and appellate right. R.C.M. 705 © M.C. M. Rule 705(4) (A) states "[t]he accused may withdraw from a pre-trial agreement at any time, however, the accuse may withdraw a plea of guilty or a confessional stipulation entered pursuant to pre-trial agreement only as provided in R.C.M. 910 (h) or 811(d), respectively.

[8] Non-judicial punishment may not be imposed for offenses which were committed more than two years before the date of imposition. See AR 27-10, para, 3-12.

indicating the proceeding was based upon the MOA-1.

B. The Non-Judicial Proceeding procedure (Article 15)

On August 25, 1998 Flowers appeared before COL. Eddie Coleman ("Col. Coleman"), Commander, Division Support Command, 25th ID(L), Schofield Barrack, Hawaii, rejected the Article 15 and demanded trial by court martial. Flowers also expressed concern regarding non-receipt of the IO report, lack of IMC communication[9] regarding the report and failure of command to investigate complaints. Col. Coleman failed to accept Flowers demand for trial by court-martial, and suspended the hearing until receipt of the IO report.

Just prior to scheduled hearing on August 28, 1998, Capt. Graff provided Flowers with an undated copy of the IO report and a "Memorandum of Agreement for Alternate Disposition of Court-Martial Charges (MOA-2) that included signature Mr. Gittins, and Col. Coleman, dated 22 Aug 98 and 28 Aug 1998 respectively, and Plaintiff's signature.[10]

The language of MOA-2 ("SGM Flowers has consulted with military and civilian counsel prior to entering this agreement. Counsel concur this agreement is in the best interest of SGM Flowers based upon the evidence adduced at the Article 32 hearing in the above-captioned case) differed from MOA-1 with plaintiff's signature, dated Jun 26, 1998 and significantly sought to downplay the Army's failure to dismiss the charges with prejudices in accordance with MOA-1.

FJFCU's response brief ("Br. Resp. FJ) incorrectly states

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[9] Right to counsel-the soldier will be informed of the right to consult with counsel and the location of counsel. See AR 3-18 (b)(2)©.

[10] Flowers cannot recall voluntarily entering into this agreement but believes the document is the result of coercion and deception instigated by Capt. Graf. Particularly, since Mr. Gittins contractual representation terminated upon completion of one Article 32 hearing.

"[t]he Article 15 hearing was held on August 28, 1998. 'Flowers and military defense counsel attended.'" Br. Resp. FJ at 9. Flowers never consented to Capt. Graff's representation but gave consent to Capt. Donna M. Bovina as assistance defense counsel.

Flowers was accompanied to the hearing by Mrs. Flowers to the hearing. Present also was Col. Eddie Coleman (SPCM authority), Maj. John Ohlweiler, Capt. Peter Graff, and an unidentified officer. Col. Coleman asked Flowers "if there is anything to you won't to say" or words to that effect." Mr. Flowers responded with "what documents and evidence you intend to use in determining guilt and punishment?" Col. Coleman replied "I saw the films" even though the Record of Proceeding Under Article 15, UCMJ, line 11 excluded documents or any evidence.[11]

The Army disregarded AR 27-10, para 3-18 (The soldier will be provided with a copy of DA Form 2527 and supporting documents and statements, for us during the proceeding, examine available evidence). Capt. Ohlweiler served as an instrument of trial to intimidate and harass and through an illegal process obtained the signature on a document that allegedly attempt to shield the Army's failure to dismiss the charges with prejudices. (emphasis added)

Col. Coleman determination of guilt according to his response was based upon "films" and he discharged punishment as follows:

a) forfeiture of $1788.00 per month for two months

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[11] The soldier shall "be allowed to examine documents or physical objects against the member which the non-judicial authority has examined in connection with the case and on which the non-judicial punishment authority intends to rely in deciding whether and how much punishment to impose" R.C.M.(1995), Part V, 4c (1) (D) see also AR-27-10,para 3-18 ("The soldier will be provided with a copy of DA form 2627 and supporting documents and statements, for use during the proceeding")

b) a formal written reprimand

To include the Army keeping (1) personal properties the Government seized from their quarters and (2) forced retirement

After discharging punishment, Col. Coleman informed Flowers "you have five (5) days to appeal to the commanding general." Col. Coleman neither stated nor Flowers signature on DA From 2727, line 7 or inquired whether plaintiff intended to appeal. [12]

Flowers submitted a timely appealed on August 31, 1998. Maj. Ohlweiler seized control of the appeal, controlled all documentation and without providing access to the appeal informed Flowers through Maj. Reineke the appeal was denied.

In October 1998 MG Hill was briefed from the Staff Judge Advocate. Absent counsel, Flowers was at a disadvantage to be heard. The tainted process caused Maj. General Hill to withdraw or negate the Article 15 and start another Article 32 proceeding when he withheld the forwarding and prosecution of charges,

C. The Commanding General's Withdrawal of the Article 15 and Subsequent Article 32 Hearing

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[12] If, at the time of imposition of punishment, the soldier indicates a desire to appeal, the superior authority may reject a subsequent election to appeal, even though it is made within the five-day period. AR 27-10, para 2-29(b). All appeals will be made on DA From 2627 or DA 2627-1 and forwarded through the imposing commander...[.] Id. at 3-31. A soldier is not required to state the reasons for the soldier's appeal. Id. The imposing commander...may take any action on the appeal, with respect to the punishment that the superior authority could take ( para 7, Part V, MCM, and para 3-33 of this regulation) Id. 3-32. When the soldier desires to appeal, the imposing commander, or the successor in command will make available to the soldier reasonable assistance in preparing the appeal and will promptly forward the appeal to the appropriate superior commander. Id.

Charges were re-preferred on November 13, 1998 after. Maj. Ohlweiler contacted Capt. Franklin M. Kang, a military lawyer assigned to 25th ID administrative law branch and provided him documents to include previous Article 32 investigative report. Maj. Ohlweiler requested he consider charges for re-preferral. See Article 32 IO Report, date March 29, 1999. CR 432. ("Capt. Ohlweiler asked me to come to Schofield. He may have said something about preferring charges, I can't remember. Major Leakehe directed me to call Captain Ohlweiler. I came up to Schofield, looked at 3 binders of evidence, and video taped evidence... '[a]t one point I asked Capt. Ohlweiler why I was preferring charges instead of the commander. He told me it was because of a conflict with the commander and they needed someone with objectivity") but see Commanding General Memo dated November, 20, 1998, ("...I hereby withhold authority for the forwarding, pretrial investigation, and disposition of charges in the case of United States v. SGM Marshall K. Flowers.")(emphasis added) See also Maj. General Hill's video deposition .CR 377

On or about November 17, 1998 the Article 15 punishment was formally withdrawn; charges (Article 121, Larceny and Article 81, Conspiracy) re-preferred were -preferred; a new Article 32 hearing scheduled with Capt. Kimberly Hunta, a Staff Judge Advocate Officer as IO, HHC 25th ID assigned as IO. On November 23, 1998 Maj. Reineke informed Flowers the Article 32 punishment was formally withdrawn and someone higher than he would decide the case.

The Article 32 investigation started on November 25, 1998 but Flowers individual military counsel, Maj. Denise Lind had departed Hawaii and Flowers was without counsel. /the hearing was suspended until resolution of who would represent Flowers.

There Flowers first realized the Army had their financial records First Hawaiian Bank that included a subpoena and financial statements and records from FJFCU documents that

consisted of financial records absent a subpoena. Flowers replied "I have not seen or received a copy of these documents." At which Capt. Hunta replied "a copy will be provided." [13]

When the Article 32 hearing reconvened on March 18, 1999, for charges of violation of Articles 121 (Larceny) and 81 (Conspiracy), [14] and completion on March 19, 1999 through counsel Flowers objected to the report due to prejudicial effect that may have resulted from Captains Kang and Huhta's receipt of the previous Article 32 investigative report by Maj. Timothy Ryan. Maj. Lewenhaupt assigned as Flowers military counsel declined to object to the report within specified (5) days.

On or about April 1, 1999 Flowers were officially informed by Maj. Reineke and Maj. Lewenhaupt that the Article 32 investigation officer would not recommend trial by General court-martial. Thereafter, on April 6, 1999, Maj. Lewenhaupt gave Flowers an unsigned copy of Capt. Huhta's investigative report and surprisingly requesting his signature on the previous withdrawn Record of Proceeding Under Article 15, UCMJ that now requested Flowers signature on Line 10 ("I have seen the action taken on my appeal") CR-350/372 .

Without waiving Flowers' objection to defendants' allegation

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[13] The binder's contents revealed plaintiff's and spouse' financial records obtained through unauthorized subpoenas from First Hawaiian and Fort Jackson FCU. A letter from FHB mailed in July 1998- allegedly notified Mr. Flowers that the Government had requested records occurred -after the Article 32 hearing on June 25-26, 1998 and records were provided to the Government.

[14] The Court's opinion and order, dated 1 March 2007 stated that the Article 32 hearing held on November 25, 1998 (See Opinion, # 12# 6) and "[t]he individuals present at he Article 32 hearing included:...Trial Counsel Captain John Ohlweiler. See n.13. Where that is true. The hearing was suspended for counsel related issues and when the hearing reconvened at 1350 hrs on March 18, 1998, the legal officer (JAG) representing the Government was Maj. Saul Contreas. Id. at 822.

of scanned and white out copies of receipts, and search authorization and seizure, the IO report was completed on March 29, 1999 and through Flowers' objection stated:

...The acts alleged to commit the conspiracy include "scanned" and "white out" copies of AAFES and NEX receipts and three specific thefts of property committed by SGM Flowers between 7-13 December 1997. To have a conspiracy, it is necessary that the accused 1) the accused entered into an agreement with a person to commit an offense and 2) while a party to the agreement, the party or co-conspirator committed a overt act to bring about the conspiracy.

*There was no evidence presented that SGM Flowers or his wife ever used a fraudulent receipt to complete a return...SGM Flowers is accused of stealing various amount of currency from AAFES and NEX by returning stolen items for a refund.* The elements of larceny are:

1) accused wrongly took property from the possession of the owner, 2) that the property belonged to a certain person, 3) that the property was of a certain value; and 4) that the taking was with intent to permanently deprive or defraud the person of the use and benefit of that property.

1) *Regarding these three specification, <u>there is no evidence that SGM Flowers stole the items that were returned to AAFES or the NEX for a refund</u>. There is no proof SGM Flowers "wrongfully took " the items. Neither SA Ebert or Ms. Huffman could not identify any item returned for a cash refund as being property previously stolen from AAFES or NEX. Testimony by both witnesses indicated that AAFES or the NEX would accept any item they stock for a refund regardless of where the item was obtained. For instance, an item obtained from Walmart can be returned to AAFES for a refund if AAFES carry the item. There is <u>no proof that any item returned to AAFES or the NEX was stolen prior to its return</u>.*

*The government has included documentation regarding SGM Flowers' finances, with the intent of demonstrating SGM Flowers' inability to purchased the items returned.*

*However, as I stated previously, the burden of proof remains on the government to prove SGM Flowers committed all the elements of offense of larceny. The government cannot conclusively prove any of the items returned were in fact stolen by SGM Flowers or Mrs. Flowers. I do not recommend proceeding with a court-martial because the evidence does not support a finding beyond a reasonable doubt.*

See CR, Exhibit "B" at 432

D. The Army's Bar to Reenlistment as Punishment and Utilization of Withdrawn Article 15 in Support.

FJFCU brief states that "General Hill and military prosecutors" apparently had decided to proceed with a General Court martial...[a]t this point Flowers term of service had expired. As an enlisted soldier, he needed to reenlist. " Br. Resp. at 9. Flowers immediate supervisor imposed a formal "bar to re-enlistment, effectively ending his military career at 28 years. The bar to reenlistment cited the previous non-judicial punishment (the Article 15 proceeding and of violations of Article 121). Id. at 10

It was obvious Maj. Ohlweiler's pivotal role in the charges, issue of the illegal subpoenas, Article 15 and subsequent bar to reenlistment was a retaliatory effort destroy Flowers career through protecting his own, particularly, in his position as SAUSA, the very same office defending the government case.

On June 21, 2003 the defendants conspired to prevent Petitioners appearance at deposition of General Hill. The following questions and answers transpired it the deposition of General James Hill with Fort Jackson Federal Credit Union's counsel presenting

questioning.

(This session raises questions regarding SGM Flowers' appeal of the non-judicial punishment ( Article 15) submitted to then MG Hill, Commander, 25th Infantry Division)

Q. General Hill, why did you deny the appeal?
A. I denied the appeal because the original charges were sufficient to warrant the Article 15. In accepting the Article 15, he acknowledged guilt in the matter and accepted the punishment meeted out by the authority in this case, Col. Coleman. And what the appeal is for is to say that the punishment is too severe. I felt like the punishment was not severe against these charges

Q Sir, What effect, if any, did any financial records of Mr. Flowers have to do with your decision to approve the Article 15 punishment?
A. None whatsoever

Q. Now, General Hill, it is my understanding that the Army at this point in the proceeding against Mr. Flowers you had lived up to its part of the bargain"
A. We had indeed.

Q. In fact, the Army had dismissed the charges without prejudices against Mr. Flowers
A. We had indeed.

Q. In fact, the Army had pursuant to the agreement issued an Article 15 punishment which we just covered.
A. Correct

Q. Sir, do you know whether or not Mr. Flowers lhad ended up--had, I'm sorry, had lived up to his end of the bargain?
A. He did not

Q. As a result of that, do you know what you instructed your staff

to do?
A. We put a bar to re-enlistment on him, we extended him on active duty--as I recall while he worked further appeals, and we initiated another Article 32 because we reconvened the charges.
Q. Okay. And why did you reconvene the charges.
A. Because part of the agreement was that he would accept the Article 32 and retire

Q. you mean accept the Article 15
A. And when he did not retire, then I negated, as I had the legal right to do, I negated the Article 15, initiated an Article 32 to reconvene general court-martial charges against him. CR 377

Assuming under oath, the deposition testimony of General Hill, not subject to cross examination is true, General Hill negated the Article 15- to as he testified initiate [another.] another Article 32 to reconvene general court-martial charges.." Id.
Merriam Webster defines "negate" as 1) to deny existence or truth of; 2) to cause to be ineffective; nullify. The basis of which the negated Article 15 (that which was ineffective) served as the basis for the bar to reenlistment.

The Government denial of discovery and General Hill's deposition demonstrate the significance of prejudices petitioners encompassed litigating their claims. Flowers stated throughout the process-the choice was retire or face a court-martial and when Flowers chose to vindicate him through court-martial, the negated Article 15 now served to bar reenlistment but more so denied due process

Based upon the investigation report, dated March 29, 1999, the conduct of previous Article 32 proceeding; unsubstantiated allegation of larceny and conspiracy absent any credible and admissible facts, and more importantly to protect his interest[15] for

[15] 32 C.F.R., Part 504 states un-categorically "[o]btaining or disclosing financial records or financial information on a customer from a financial institution in violation of the act or this regulation may subject the Army

intentional violation of the RFPA, the last available option was "make Flowers go away" through a bar to reenlistment.

On April 27, 1999, under Army Retention Program, AR 601-280, Chapter 8, Maj. Reineke was ordered to initiate a bar-to-reenlistment contrary to MG Hill's memorandum withholding authority of commanders in forwarding, pretrial investigation, and disposition of charges.

Army Retention Program, para 8-2(b) states:

> The Bar to Reenlistment is not punitive action but is designed for use as a rehabilitative tool. The Bar to Reenlistment should be initiated prior to a Separation or judicial/non-judicial action because it is intended to put the soldier on notice that:
>
> (1) He or she is not a candidate for reenlistment.
> (2) He or she may be a candidate for separation if the circumstances that led to the Bar to Reenlistment is not overcome

See AR 601-280, para 8-2(b)

> Bar to Reenlistment will not be used instead of trial by court-martial, non-judicial punishment, or other administrative action. Id. at para 8-3(c). (emphasis added).

Through personal telephone call to JAG, Army Retention ranch Maj. Ohlweiler successfully orchestrated-contrary to regulation-having a civilian Ronald L. Canada Chief, Retention Management Branch state in a memo, dated June 21, 1999 in response to Flowers appeal of the bar to reenlistment that " [r]equest for appeal to the Bar to Reenlistment for SGM Flowers

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to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the Act or this regulation may be subject to disciplinary action. 32 C.F.R. 504.2 (l)

cannot be favorably considered. 'SGM Flowers has not presented sufficient justification to warrant approval of his request for an appeal to the Bar to Reenlistment." [16] See AR 601-280. at para 8-5(e)(2) ( "For soldiers with more than 10 years active federal service at the date of bar initiation, the approval or disapproval authority is CG, PERSCOM") Id. at para 8-5(e)(2)

Flowers was "made to go away" from the military into involuntary retirement with 28 years of honorable service on February 1, 2000.

## III. ARGUMENT

Defendants rely chiefly on this Court's decision in Feres v. United States, 340 U.S. 135 (1950) proposition that the Army issue of illegal subpoenas for petitioner's financial records and retaliation effort to involuntary dismiss Flowers from the Army excludes this Court review. Further, the Government argues that because the opinion is unpublished and thus does not constitute binding precedent within the Ninth Circuit (Gov. Oppos. Br. At 8.). The obvious conclusion here is the government appears to say to the court the opinion is non-binding so bases on the specific facts of this case-that is the allegation that "Army officials had willfully violated the RFPA" as part of a military conspiracy to press false disciplinary charges."

The Right to Financial Privacy Act is statutory law, applicable to "Government authorities," the statue is promulgated by the Army in 32 CFR, Part 275 and 504, and Army Regulation 190-6 Obtaining Information from Financial Institutions. The statue and regulations prescribes penalties for violation by Government authorities as stated in petitioners Appendix. See 111a, 113a, and 159a.("Obtaining or disclosing financial records or financial

[16] Essentially, MG Hill became the accuser by withholding forwarding, investigation, and punishment of charges from subordinate commanders but ordering Maj. Reineke to initiate the Bar to Reenlistment that circumvented regulation.

information on a customer from a financial institution in violation of this regulation may subject the Army to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees.)
Because Petitioners seek to enforcement pursuant to the statue and regulations and in absence of any wrongdoing, the Government should not be permitted to reign sovereign over the law it enacted, a law to control its behavior.

## IV. CONCLUSION

Respectfully, the decision of the lower court dismissal pursuant to Feres and affirmation by the Ninth Circuit of appeals were in error. Therefore, the United States Supreme Court should grant petitioners certiorari.

Respectfully submitted

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